Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RENT-A-CENTER, INC.,

Petitioner,

v.

HILDA PEREZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rent-A-Center has conducted business in New Jersey for twenty years. Rent-A-Center structured its business practices in the State in reliance upon two well-established precepts of state law: New Jersey's Retail Installment Sales Act ("RISA") did not apply to rent-to-own transactions, and the State's usury laws regulated only the lending of money. These conclusions flowed naturally from the text of the pertinent statutes and numerous state court decisions.

In the decision below, the Supreme Court of New Jersey abrogated both of these tenets, holding, for the first time, that: (1) rent-to-own transactions are "installment sales" within the meaning of RISA, and (2) the interest-rate limitations of the State's criminal usury law apply to such "installment sales."

Perhaps acknowledging the sea change it had enacted, the state supreme court on reconsideration provided that its judgment was "prospective." But, after further reconsideration, the court again modified its judgment to be "prospective, *except that*" the new rules announced therein would apply retroactively in respondent's putative class action against Rent-A-Center, subjecting Rent-A-Center to a trebled damage judgment of substantial proportions.

The question presented is whether the decision below, by announcing new and unforeseeable state-law rules and then retroactively applying those rules to completed business conduct, violated Rent-A-Center's right to due process under the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below. No class has been certified, and thus its membership is not yet defined.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Rent-A-Center, Inc. has no parent company, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rent-A-Center, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 892 A.2d 1255. App., *infra*, 1a. The initial order modifying the judgment is unreported. *Id.* 42a. The second order modifying the judgment is reported at 902 A.2d 1355. *Id.* 43a. The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 866 A.2d 1000. *Id.* 44a. The opinion of the Superior Court of New Jersey, Law Division, is unreported. *Id.* 77a (transcript of oral decision).

JURISDICTION

The Supreme Court of New Jersey entered its judgment on March 15, 2006. Rent-A-Center timely moved for reconsideration, and on June 23, 2006, the court entered an order modifying its judgment. On July 10, 2006, the court further modified its judgment to make clear that the judgment applied retroactively to plaintiff's claims against Rent-A-Center. On September 15, Justice Souter extended the time for filing a petition for a writ of certiorari to and including November 9, 2006. No. 06A294. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

New Jersey's Retail Installment Sales Act provides in relevant part:

> "Retail installment contract" means any contract . . . between a retail seller and a retail buyer evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes, or any part thereof, in two or more installments over a period of time. This term includes . . . any contract for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of such retail installment contract.

N.J. STAT. ANN. § 17:16C-1(b).

"'Time price differential' means the amount or amounts, however denominated or computed, in addition to the cash price or prices, to be paid by the retail buyer for the privilege of purchasing goods or services pursuant to a retail installment contract or a retail charge account." N.J. STAT. ANN. § 17:16C-1(*l*).

"A retail seller . . . shall have authority to charge, contract for, receive or collect a time price differential as defined in this act, on any retail installment contract evidencing the sale of goods or services in an amount or amounts as agreed to by the retail seller . . . and the buyer . . . ." N.J. STAT. ANN. § 17:16C-41.

New Jersey's criminal usury statute provides in relevant part: "[A]ny loan or forbearance with an interest rate which exceeds 30% per annum shall not be a rate authorized or permitted by law . . . ." N.J. STAT. ANN. § 2C:21-19(a).

STATEMENT OF THE CASE

This case presents a due process question of compelling importance. In a single opinion, the Supreme Court of New Jersey announced two new rules of law that eliminated clear distinctions between loans of money, retail installment sales, and rent-to-own transactions, *combined* the two new rules, and applied them retroactively to subject a business to liability, including potentially trebled damages, for past conduct that was indisputably lawful when completed. That decision implicates the ability of every person to rely upon clearly established judicial doctrines and the plain language of statutes to order their lives, including their business affairs, and to conform their conduct to the law.

The conduct at issue in this case occurred in 2001 and 2002, when Rent-A-Center, Inc. and Hilda Perez entered into several rent-to-own contracts for various household goods. At that time, the plain language of New Jersey's Retail Installment Sales Act ("RISA") made clear that the statute did not apply to rent-to-own transactions. Moreover, numerous judicial decisions, including two decisions of the Supreme Court of New Jersey, made clear that (under what was known as the "time-price doctrine") usury statutes applied only to loans or forbearances of *money*, and not to the sale of *goods* on credit. Indeed, RISA itself echoed the time-price doctrine, expressly permitting retail buyers and sellers to set the "time price differential"—*i.e.*, the difference between the cash purchase price and the price to purchase on credit in installment, *see* N.J. STAT. ANN. § 17:16C-1(*l*)—at any amount they "agreed to," *id.* § 17:16C-41.

Notwithstanding the investment-backed expectations arising from this settled body of law, the decision below contorted RISA to conclude that rent-to-own transactions are "installment sales," and then scuttled the decades-old time-price doctrine so that it could apply the criminal usury statute's 30-percent interest-rate cap to Rent-A-Center's rental agreements. Apparently recognizing the novelty of its expansive construction of RISA and the abruptness of its de-

struction of the time-price doctrine, the Supreme Court of New Jersey, on reconsideration, modified its ruling to provide, "The judgment of the Court is prospective." App., *infra*, 42a. The court soon retrenched that ground, however, further modifying its ruling to state that "[t]he judgment . . . is prospective, *except* that" it applies retroactively to plaintiff's claims against Rent-A-Center. *Id.* 43a (emphasis added).

This retroactive application of new, judicially manufactured rules of law—raising a real threat of confiscatory damages—trampled Rent-A-Center's fundamental due process entitlement to fair notice of the law's content prior to the imposition of liability. This case has profound implications for citizens and for the businesses they operate and invest in across the Nation. Under the approach taken by the court below, citizens cannot rely upon well-established judicial doctrines and straightforward statutory language when planning their business affairs. All such authorities remain subject to even the most outlandish judicial manipulation, and citizens remain subject to retroactive application of the reinvented rules of law that result. This approach conflicts with several of this Court's due process precedents, three decisions of courts of appeals, and a decision of the California Supreme Court. This Court's review is warranted.

1. Rent-A-Center, Inc., is the nation's largest rent-to-own company, with stores in all 50 States, the District of Columbia, and Puerto Rico. Founded in 1986, Rent-A-Center opened its doors in New Jersey that same year. Rent-A-Center now operates 2,722 stores in the United States (43 of which are in New Jersey) and employs more than 17,000 people. Rent-A-Center became a publicly traded company in 1995 and today is a Fortune 1000 company.

Like other rent-to-own businesses, Rent-A-Center rents furniture, appliances, and home electronics to consumers. As the Federal Trade Commission has explained, "[r]ent-to-own transactions provide immediate access to household goods for a relatively low weekly or monthly payment, typically

without any down payment or credit check." Fed. Trade Comm'n, Survey of Rent-to-Own Customers ES-3 (Apr. 2000) (hereinafter "FTC Report"). A key feature of rent-to-own agreements is that the consumer may terminate the agreement at any time by returning the rented merchandise. "Consumers . . . are under no obligation to continue payments beyond the current weekly or monthly period." *Id.* Unlike other rental transactions, though, a rent-to-own agreement also "provides the option to purchase the goods, either by continuing to pay rent for a specified period of time, usually 12 to 24 months, or by early payment of some specified proportion of the remaining lease payments." *Id.*

The FTC Report touts the benefits of rent-to-own transactions: They permit ready access, usually without requiring a down payment or credit check, to household goods for a relatively low rental fee; they fill "temporary need[s]"; they provide the option of "try[ing] a product before buying it"; and they offer flexibility with "no obligation to continue payments beyond the current . . . period." FTC Report, at ES-3. The terminable nature of the transaction offers "significant value" to customers. Michael H. Anderson & Raymond Jackson, *A Reconsideration of Rent-to-Own*, 35 J. Consumer Aff. 295, 301 (Winter 2001).

Rent-to-own businesses also incur costs and risks not faced by other retailers or lenders, and, accordingly, they price their transactions differently. Rent-to-own businesses provide goods to individuals regardless of credit. Indeed, 23 percent of rent-to-own customers have no credit card, checking account, or savings account. FTC Report, at ES-2. Moreover, rent-to-own transactions also offer "valuable services and options unavailable in an installment purchase agreement." Anderson, *supra*, at 295. Included in the cost of most rent-to-own transactions are delivery and setup and repair service. *Id.* at 296–97, 300. Traditional retailers typically charge additional fees for these services. *Id.*

Despite the relatively higher price of rent-to-own transactions, many Americans find them to be attractive alterna-

tives to cash purchases: 2.3 percent of U.S. households engaged in rent-to-own transactions in 1998, and 4.9 percent of U.S. households had done so in the preceding five years. FTC Report, at ES-1.

2. Respondent Hilda Perez entered into five rent-to-own contracts with Rent-A-Center in 2001 and 2002 for various household goods. App., *infra*, 4a. In May 2002, Perez stopped making payments but retained the merchandise, despite the fact that she had not made all of the rental payments or the option payment necessary to acquire ownership. *Id.* 8a. Perez subsequently brought a putative class action against Rent-A-Center alleging that her rental agreements violated RISA because they imposed an inherent interest rate in excess of the 30 percent permitted by the criminal usury statute. *Id.* Perez further alleged that the RISA violations constituted violations of New Jersey's Consumer Fraud Act, entitling her to treble damages.[1] *Id.*

Perez's legal theory hinges on two crucial premises: first, that her rent-to-own agreements were "installment sales" within the meaning of RISA; and second, that the criminal usury statute's 30-percent interest-rate cap applies to installments sales as defined by RISA. App., *infra*, 45a–46a. At the time Perez filed her complaint—indeed, until the decision below—the plain text of RISA and numerous judicial decisions foreclosed both premises.

3.a. Until the decision below, a dispassionate reader of New Jersey's RISA statute would have found little reason to suspect that the statute might sweep in Rent-A-Center's rental agreements with Perez. The text of RISA is clear.

RISA's definition of a "retail installment contract" requires that the contract "evidenc[e] an agreement to pay the

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[1] Plaintiff has also alleged violations of the New Jersey Consumer Fraud Act, N.J. STAT. ANN. §§ 56:8-1 to -135, claiming that Rent-A-Center's pricing in alleged violation of RISA and the criminal usury statute is "unconscionable." The Consumer Fraud Act provides the remedy of trebled damages. *Id.* § 56:8-19.

retail purchase price of goods or services" or an "agree[ment] to pay as compensation a sum substantially equivalent to or in excess of the value of the goods." N.J. STAT. ANN. § 17:16C-1(b).[2] Perez's rental agreements with Rent-A-Center evidence no such agreement "to pay the retail purchase price" or "a sum substantially equivalent to or in excess of the value of the goods." *Id.* To the contrary, Rent-A-Center's rent-to-own agreements are terminable at the renter's option. The renter *agrees* only to pay the rental rate or to return the merchandise. App., *infra*, 5a–7a. Perez's rental agreements permitted her to rent an item for one week, make a single payment that was a fraction of the "retail purchase price" or the "value of the good[]," and then return the item. Because rent-to-own agreements lack an enforceable agreement by the renter to pay the "retail purchase price" or the "value of the good[]," they could not have been deemed "retail installment sales" before the issuance of the opinion below.[3]

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[2] The federal Truth in Lending Act, 15 U.S.C. §§ 1601–1667f ("TILA"), uses substantially similar language; it defines "credit sale" to include only leases that include an agreement to pay "a sum substantially equivalent to or in excess of the aggregate value of the property and services involved," *id.* § 1602(g). In 1981, the Federal Reserve Board adopted regulations interpreting TILA that expressly exclude from the definition of "credit sale" any contracts that are "terminable without penalty at any time by the consumer," Regulation Z, 46 Fed. Reg. 20848, 20893 (Apr. 7, 1981); 12 C.F.R. § 226.2(a)(16), and courts have applied that long-standing interpretation to rent-to-own contracts, *see, e.g.*, *Ortiz v. Rental Mgmt., Inc.*, 65 F.3d 335 (3d Cir. 1995); *In re Hanley*, 135 B.R. 311 (C.D. Ill. 1990). Moreoever, New Jersey law explicitly provides that compliance with TILA suffices to demonstrate compliance with RISA. N.J. STAT. ANN. § 17:3B-1.

[3] Indeed, before the decision below, the only indications that Perez's argument was even colorable were two New Jersey trial court rulings from the 1990s. *See Green v. Cont'l Rentals*, 678 A.2d 759 (N.J. Super. Ct. Law Div. 1994); *Robinson v. Thorn Ams., Inc.*, No. CAM-L-3697-94 (N.J. Super. Ct. Law Div. 1997) (unpublished transcript of oral decision, reprinted at App., *infra*, 82a–91a). These nonprecedential decisions,

b. But even if RISA's definition of "retail installment sale" reasonably could have been read to include rent-to-own transactions—and it could not—before the decision below, New Jersey law was absolutely clear that the interest-rate limitations of the State's usury laws did not apply to installment sales of goods.

First, the text of RISA made clear that the statute did not regulate the amount of the "time price differential," that is, the difference between the price to purchase a good for cash and the price to purchase it on credit in installments. *See* N.J. STAT. ANN. § 17:16C-1(*l*) (defining "time price differential"). Although when enacted, RISA imposed a ten-percent per annum limit on time-price differentials, in 1981 the state legislature amended the statute to its current language, which provides that a "retail seller . . . shall have authority to charge . . . a time price differential . . . in an amount or amounts *as agreed to* by the retail seller . . . and the buyer." *Id.* § 17:16C-41 (emphasis added). Far from limiting time-price differentials, the 1981 amendments to RISA abolished such limits.

Moreover, four decades of binding precedent had foreclosed any suggestion that usury limitations on the lending of money applied to time-price differentials on the sale of goods. As the decision below recognized, under the "time price doctrine," "the law treated the taking of interest in connection with the sale of goods as entirely different from the

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[Footnote continued from previous page]

however, could hardly be viewed as authoritative statements of the law. As the court below recognized, *Robinson* settled before an appeal could be taken and the settlement "operate[d] to vacate the earlier summary judgment." App., *infra*, 14a. And *Green* never addressed the textually grounded argument that installment sales require an enforceable agreement to pay the full value of the good, relying instead on "the spirit of the legislation," 678 A.2d at 764, and a profoundly flawed analogy to TILA. *See* App., *infra*, 65a (explaining that the Third Circuit has rejected *Green*'s erroneous conclusion that TILA applied to rent-to-own contracts).

taking of interest on a loan of money per se." App., *infra*, 15a (citing, *inter alia*, *Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 118–19 (1861) (holding that it was not usurious to agree to sell land by installment payments because "[s]uch a contract has none of the characteristics of usury; it is not a loan of money, or forbearance of a debt")). And indeed, after RISA's enactment in 1960, New Jersey courts, including the New Jersey Supreme Court, continued to affirm the validity of the time-price doctrine.

In 1965, the Chancery Division of the Superior Court of New Jersey held that a credit service charge that permitted the buyer "the privilege of paying the purchase price for [goods] in deferred installments" did not violate the State's general usury statute. *Steffenauer v. Mytelka & Rose, Inc.*, 210 A.2d 88, 91, 95 (N.J. Super. Ct. Ch. Div. 1965). The court explained that "the statute against usury is striking at and forbidding the exaction or receipt of more than a specified legal rate *for the hire of money and not of anything else*." *Id.* at 91–92 (emphasis added). Affirming the decision for the reasons given below, the New Jersey Supreme Court specifically agreed that "the transaction was a sale, and hence beyond the general usury statute." *Steffenauer v. Mytelka & Rose, Inc.*, 216 A.2d 585, 585 (N.J. 1966).

Five years later, the New Jersey Supreme Court again applied this rule. Explaining that "[t]he time-price doctrine is firmly imbedded in this state," the state supreme court rejected the argument that the general usury statute applied to transactions that were sales rather than loans or forbearances of money. *Sliger v. R.H. Macy & Co.*, 283 A.2d 904, 906 (N.J. 1971) (affirming a grant of summary judgment in favor of a retail department store). The New Jersey Supreme Court, noting that an "overwhelming majority of courts" had held that similar transactions were not usurious, held that "an increase in price for a credit sale over the cash sale price is not a loan or forbearance of money." *Id.*

Even after the 1981 amendments to RISA that abolished the ten-percent per annum limit on time-price differentials,

New Jersey's appellate division continued to apply the settled time-price doctrine. In 1990, a New Jersey intermediate appellate court reiterated that "[i]t has long been established in this state that the general usury statute does not apply to finance charges imposed on a purchaser in connection with an installment sale." *Saul v. Midlantic Nat'l Bank*, 572 A.2d 650, 654 (N.J. Super. Ct. App. Div. 1990). The court explained that "RISA effectively codifies the 'time price doctrine' and authorizes those persons subject to RISA to collect finance charges in an amount agreed to between buyer and seller without regard to the ceiling imposed by the general usury statute." *Id.* at 655. Accordingly, the appellate court repeated the reasoning that the usury statutes applied to "the hire of money and not of anything else" and refused to apply the general usury statute to a retail installment sale. *Id.* at 654; *see also id.* at 656 ("Installment sales contracts, such as the one involved here, simply are not governed by the general usury statute.").[4]

Thus, at the time Perez filed her class action complaint, the great weight of pertinent state-law authority fairly indicated that (1) rent-to-own transactions were not "installment sales" under RISA, and (2) usury limitations did not apply to installment sales in any event.

4.a. The trial court accordingly granted summary judgment to Rent-A-Center on Perez's claims. App., *infra*, 47a.

A unanimous panel of the Appellate Division affirmed. App., *infra*, 44a–76a. First, addressing the question of

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[4] It is true that in *Green*, the trial court swam against the tide and applied the criminal usury statute's 30-percent per annum limitation to the time-price differentials in what it had determined (erroneously) to be installment sales. 678 A.2d at 764. Inasmuch as *Green* cited only Minnesota law to support its conclusion that usury laws regulated time-price differentials, *see id.* at 766, and failed to mention—let alone, distinguish—New Jersey's "firmly imbedded" time-price doctrine, *Sliger*, 283 A.2d at 906, its nonprecedential statement of the law cannot be regarded as anything more than an aberration.

whether RISA applies to rent-to-own contracts, the court analyzed RISA's definition of "retail installment sale" and the contracts at issue, and held "the contracts between Perez and Rent-A-Center do not constitute 'retail installment contracts' as defined by RISA." *Id.* 63a. This conclusion followed from the fact that Ms. Perez "never agreed to pay anything more than each individual weekly payment." *Id.*

As an alternative basis for affirmance, the Appellate Division held that "even if RISA applied to [Rent-A-Center's] contracts," "the criminal usury statute does not apply to sales transactions, including retail installment sales governed by RISA, nor does it apply to the [rent-to-own] agreements between the parties in this case." App., *infra*, 66a, 67a (citation omitted). Perez had argued that "legislative history, the purpose of RISA, and the 1981 amendments to RISA and the criminal usury statute" all compel the conclusion that the interest-rate limitation in the criminal usury statute had been incorporated into RISA. *Id.* 67a–68a. The Appellate Division, though, found the contention "unpersuasive," inasmuch as it was "contrary to judicial precedent." *Id.* 68a. The court explained that "New Jersey courts have repeatedly held that the civil usury statute does not apply in the context of time-price differentials calculated with respect to sales transactions," and that "[i]n light of *Sliger*, *Saul*, and *Steffenauer*, the legislative history cited by plaintiff loses persuasive power." *Id.* 68a, 72a (citation omitted).

b. The Supreme Court of New Jersey granted review. In its brief to the state supreme court, Rent-A-Center argued that the Appellate Division's holdings were compelled by RISA's statutory text and four decades of controlling precedents affirming the time-price doctrine. Rent-A-Center further argued that given the "firmly imbedded" time-price doctrine, *Sliger*, 283 A.2d at 906, any ruling that applied the criminal usury statute to rent-to-own contracts "would run afoul of procedural due process protections." App., *infra*,

93a.[5] The core due process notion of fair notice, Rent-A-Center reasoned, compelled a narrow construction of the criminal usury statute's reach. *Id.*

A divided state supreme court reversed the decisions below and revived Perez's class action claims. Acknowledging that Rent-A-Center's "rent-to-own contracts are not a perfect fit with the words of the statute," the majority opinion nevertheless concluded that they were "retail installment sales" within the meaning of RISA. App., *infra*, 22a. While the majority conceded that, under those contracts, Perez "could return the goods at any time and stop making payments," *id.* 7a, it was unconvinced "that the cancellation provision . . . altered the fundamental nature of the transaction." *Id.* 26a. Particularly where a statute is "limned for consumer protective purposes," *id.*, the opinion reasoned, "[t]he spirit of the legislative direction prevails over the literal sense of the terms." *Id.* 23a. Here, the "evident legislative design" was "to sweep into the Act as many cognate agreements as possible, even those that did not strictly fall within a denominated category." *Id.* 23a, 24a.

Having held that rent-to-own agreements are installment sales, the majority then inferred from the circumstances surrounding the enactment of the 1981 amendment of RISA that it also incorporated *sub silentio* the criminal usury statute's contemporaneously adjusted interest-rate limitation. App., *infra*, 28a–32a. Addressing Rent-A-Center's argument that the time-price doctrine foreclosed such a conclusion, the majority announced the previously unheralded demise of the doctrine, noting simply that the "historical exception lost its currency" in the middle of the twentieth century and that the "common-law notion" had been "abrogate[d]" by RISA's enactment in 1960. *Id.* 32a, 33a. The post-RISA cases ap-

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[5] Under the New Jersey Rules of Court, a respondent's brief to the Supreme Court of New Jersey consists of a brief, not longer than 20 pages, opposing certification of the appeal, and a copy of the brief submitted by the respondent to the Appellate Division. N.J. Rule 2:12-8.

plying the time-price doctrine—*Steffenauer*, *Sliger*, and *Saul*—were shunted aside because they addressed the civil usury statute, rather than the criminal usury statute. *Sliger*'s statement that the time-price doctrine is "firmly imbedded in this state," *Sliger*, 283 A.2d at 906, passed without mention.[6]

Justice Rivera-Soto dissented. He disputed the majority's inference of legislative intent to bring rent-to-own transactions within RISA, noting the legislature had "recognized the value and contributions of [the rent-to-own] industry in a most eloquent way: by simply leaving it alone." App., *infra*, 40a. And he criticized the majority for imposing a "cobbled-together judicial cure for a perceived but unsubstantiated ill," *id.*, which he ascribed to a "particularly noxious version of *noblesse oblige*," *id.* 39a.

The Supreme Court of New Jersey never addressed Rent-A-Center's argument that application of the criminal usury statute to its transactions would violate its due process rights to fair notice.

c. Rent-A-Center timely moved for reconsideration or, in the alternative, clarification that the judgment of the state supreme court applied only prospectively. Rent-A-Center argued that retroactive application of the new rules of law announced in the majority opinion to its completed business conduct would violate its rights to due process under the United States Constitution. App., *infra*, 96a–107a.

The state supreme court soon thereafter issued an order providing that "[t]he judgment of the Court is prospective. It

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[6] The majority opinion also suggested that a footnote in the Appellate Division's opinion in *Saul* "actually holds that the criminal usury statute is applicable to retail installment sales." App., *infra*, 34a. This is clearly wrong. *See Saul*, 572 A.2d at 656 ("Installment sales contracts, such as the one involved here, simply *are not governed* by the general usury statute.") (emphasis added). Moreover, the Court that authored that footnote both recognized that it amounted only to a "suggesti[on] in dicta" and explicitly disclaimed and rejected the interpretation that the state supreme court ascribed to it. App., *infra*, 73a.

applies to the plaintiff and, if the trial court certifies this matter as a class action . . . , to the members of the class." App., *infra*, 42a. Perez immediately moved for further clarification, contending that the order's provision that the "prospective" judgment "applies to plaintiff" authorized full retroactive application of the new rules of law announced by the court to her claims against Rent-A-Center.

The court then issued a second order modifying the judgment, this time providing: "The judgment of the Court is prospective, *except that* it applies to plaintiff and if the trial court certifies this matter as a class action . . . , to the members of the class." *Id.* 43a (emphasis added). The new rules announced in the judgment of the state supreme court would apply prospectively, except that they would apply retroactively to Rent-A-Center, and only to Rent-A-Center.

This petition follows.

REASONS FOR GRANTING THE PETITION

Whatever the merits of the decision below, there can be no doubt that it radically changed the law of New Jersey. Indeed, why else would the state supreme court modify its judgment to be even partially "prospective"? In a single opinion, a majority of the Supreme Court of New Jersey declared rent-to-own contracts to be installment sales and held that all installment sales were to be regulated according to the State's criminal usury statute, obliterating along the way New Jersey's decades-old and "firmly imbedded" time-price doctrine. Before the decision below, no New Jersey appellate court had reached *any* of those conclusions, never mind *all*.

By retroactively applying these new rules to Rent-A-Center's long-completed business conduct, the state supreme court trenched upon Rent-A-Center's due process right to fair notice of the obligations imposed on it by the law. If it were the New Jersey state legislature (rather than the state supreme court) that had changed the governing state law, due process almost surely would have prohibited its retroactive applica-

tion. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). In the absence of an express legislative mandate commanding retroactive application, due process does not permit a State to "increase a party's liability for past conduct," or to "impose new duties with respect to transactions already completed." *Id.* at 280. The question presented in this case is whether New Jersey may revise through judicial action the same rights and obligations that it presumptively may not adjust through legislative action.

This Court has consistently answered that question in the negative. More than forty years ago, this Court recognized that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). And since that time, this Court has consistently prohibited the retroactive application of judicially created rules that are "indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (quoting *Bouie*, 378 U.S. at 354). The decision below, which stubbornly insists on imposing retroactive liability on Rent-A-Center—and only on Rent-A-Center—disregarded these controlling precedents.

Rent-A-Center has operated its rent-to-own business in New Jersey for twenty years, and for nearly all of that time, it had done so in reliance on clear and settled New Jersey law. Now, the Supreme Court of New Jersey has changed the law, and its judgment purports to retroactively apply its new judicially created rules to Rent-A-Center. Specifically, the decision below professes to convert twenty years of legitimate business into twenty years of criminal usury, and to impose retroactively on Rent-A-Center all liabilities, including a threat of trebled damages of confiscatory proportion, attendant to that reclassification. If state courts are at liberty to apply new and unforeseeable rules retroactively to completed conduct, no individual is guaranteed a fair opportunity to conform his or her conduct to the law, and no business may

safely rely on settled law to order its affairs. This Court should grant the petition to vindicate the fundamental due process interests in notice and repose.

I. The Supreme Court Of New Jersey's Retroactive Application Of Unexpected And Indefensible New Rules Violates Due Process

The decision below conflicts with at least four of this Court's precedents, the decisions of three federal courts of appeals, and a decision of the California Supreme Court. This Court's review is warranted to resolve these conflicts over the limits that federal due process interests place on the authority of state courts to retroactively apply new rules of law. *See* Sup. Ct. R. 10(b), (c).

A. The Supreme Court Of New Jersey's Decision Conflicts With Several Decisions Of This Court Concerning The Retroactive Application Of New Law

1. The Due Process Clause of the Fourteenth Amendment provides that no state may deprive any person of property without due process of law. One fundamental element of due process is notice that particular conduct is unlawful. *See Bouie*, 378 U.S. at 351 (notice is "the first essential of due process of law"). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. "Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

Retroactive application of new law violates this fundamental element of due process. The principle that retroactivity is disfavored in the law is "as ancient as the law itself," and it is "deeply rooted in [this Court's] jurisprudence." *Landgraf*, 511 U.S. at 265 & n.17; *see also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) (observing that in "private cases between indi-

viduals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"). In the words of Justice Story, "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with fundamental principles of the social compact." *E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1891)). Instead of permitting citizens to order their behavior within the confines of the law, retroactive laws "deprive citizens of legitimate expectations and upset settled transactions." *Id.* (quoting *Gen. Motors Co. v. Romein*, 503 U.S. 181, 191 (1992)). Accordingly, this Court has recognized that new rules "ought not to change the character of past transactions carried on upon the faith of the then existing law." *Id.*

This anti-retroactivity principle finds perhaps its most powerful expression in the rule of lenity. The rule of lenity is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979). It "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). The application of the rule of lenity and of the due process interests which undergird it is not, however, limited to criminal cases. As this Court recently held, whether "in a criminal or noncriminal context," "the rule of lenity applies" whenever a court is called to apply or interpret a criminal statute. *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005). Indeed, the Due Process Clause's interest in fair notice—"the basic protection against 'judgments without notice'"—is implicated in any case involving "civil *penalties*." *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574 n.22 (1996) (citation omitted); *see also Landgraf*, 511 U.S. at 282–86 (holding that the Due Process Clause prohibited retroactive application of a statute enlarging a damages remedy).

Moreover, retroactive imposition of liability implicates due process whether the new rule is announced in legislation or a judicial decision. As this Court explained in *Bouie*, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive *judicial* expansion of narrow and precise statutory language." 378 U.S. at 352 (emphasis added); *see also Lanier*, 520 U.S. at 266–67 ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."). An individual is no less deprived of his property without notice by a judicial act than by a legislative one. *See Bouie*, 378 U.S. at 353 ("Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law."). Whether the new rule originates in the legislature or the judiciary, the key constitutional question is whether the parties made subject to it received fair notice of its substantive limitations on conduct so they might conform to its mandate.

The due process limitations on retroactive application of judicially created law are not, of course, unqualified. As this Court has explained, "[t]he common law . . . presupposes a measure of evolution." *Rogers*, 532 U.S. at 461. It was in order to preserve "the incremental and reasoned development of precedent that is the foundation of the common law system," *id.*, that this Court in *Bouie* explained the due process limits on judicial rulings: Retroactive application of new rules violates due process when the new rules are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," 378 U.S. at 354 (quotations omitted); *see also Marks v. United States*, 430 U.S. 188, 192 (1977). This limitation "protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law," while still permitting courts leeway in the context of common-law judging. *Rogers*, 532 U.S. at 462.

2. The New Jersey Supreme Court's decision—which abrogated the time-price doctrine, construed RISA's plain language to sweep in rent-to-own transactions, and then applied these new rules retroactively to Rent-A-Center's past conduct—violates Rent-A-Center's rights to due process and is contrary to this Court's rulings in *Bouie*, *Marks*, *Rogers*, and *Landgraf*.

a. In *Bouie*, this Court reversed a decision of the South Carolina Supreme Court that retroactively applied a new interpretation of a criminal trespass statute to civil-rights demonstrators. 378 U.S. at 362; *id.* at 350 n.2, 355. At the time of the demonstrators' conduct, the "admirably narrow and precise" language of the criminal trespass statute precluded only "entry upon the lands of another . . . after notice . . . prohibiting such entry," *id.* at 349 n.1; it did not reach an act prohibited by the law of civil trespass, namely remaining on another's premises after being told to leave, *id.* at 357. The demonstrators did not receive notice prohibiting entry before they entered to begin their sit-in, and they refused to leave when asked. *Id.* at 348. The South Carolina Supreme Court affirmed their convictions for criminal trespass by construing the statute to cover the act of remaining after being asked to leave. This Court noted that the pre-existing law gave "no warning whatever" that the criminal statute would be construed to reach the demonstrators' conduct, *id.* at 359, and further explained that "[w]hen a statute on its face is narrow and precise," an unforeseeable and retroactive judicial expansion is particularly likely to amount to a deprivation of fair notice because it gives "no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial expansion." *Id.* at 352. "If a judicial construction of a criminal statute," this Court continued, "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Id.* at 354 (quotations omitted). This Court therefore thought "it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions,

has deprived petitioners of rights guaranteed them by the Due Process Clause." *Id.* at 362. While the new construction was "of course valid for the future, it [could] not be applied retroactively, any more than a legislative enactment [could] be." *Id.*

The judgment of the New Jersey Supreme Court in this case directly conflicts with the reasoning and holding of *Bouie*. The decision violates the Due Process Clause in precisely the same way the judgment of the South Carolina Supreme Court did: It announces new, unforeseeable, and liability-enlarging constructions of statutes, and it applies them to already completed conduct. Indeed, the New Jersey decision is even more disturbing than the decision in *Bouie*, for it announces not just one new rule, as in *Bouie*, but two, and applies both in one opinion.

Like the trespassing statute in *Bouie*, RISA's definition of "retail installment contract" is "narrow and precise" on its face and in no way suggested that terminable rent-to-own contracts fell within its ambit. *Id.* at 352. To the contrary, RISA regulates only contracts reflecting an agreement "to pay the retail purchase price of goods" or "to pay as compensation a sum substantially equivalent to or in excess of the value of the goods." N.J. STAT. ANN. § 17:16C-1(b). To paraphrase *Bouie*, its precise language "gave not the slightest indication that [the] requirement [that there be an agreement to pay the purchase price for the goods] could be satisfied by proof of the different act of [agreeing to make one weekly rental payment]." 378 U.S. at 357. Indeed, the decision below *concedes* that "[c]ertainly . . . Perez's rent-to-own contracts are not a perfect fit with the words of the statute." App., *infra*, 22a. The state supreme court instead relied on "[t]he spirit of the legislative direction," which, in its view, "prevail[ed] over the literal sense of the terms." *Id.* at 23a.

The court's construction of RISA as incorporating the cap from the criminal usury statute was even more unexpected and indefensible. To achieve this result, the court had to eliminate the time-price doctrine entrenched in an unbro-

ken line of precedent spanning four decades. The court claimed that the "historical exception [had] lost its currency" by the time of RISA's enactment in 1960. App., *infra*, 32a–33a. But that surely would have come as a surprise to the then-sitting justices of the New Jersey Supreme Court, who in 1966 and in 1971—*after* the passage of RISA—held that the time-price doctrine applied to installment sales, *see Steffenauer*, 216 A.2d at 585, and remained "firmly imbedded in this state," *Sliger*, 283 A.2d at 906.

What is more, the 1981 amendments to RISA suggested no intent to abrogate the doctrine. To the contrary, the legislature enlarged the gap between its treatment of time-price differentials and interest by removing the limitation on time-price differentials at the same time it imposed stricter limitations on usury. It is hard to see how this amounts to an abrogation of the distinction between the two or how these concurrent amendments support the decision below to "interpret RISA as incorporating the 30% cap." App., *infra*, 35a. In addition, RISA continued to use the term "time price differential," and the criminal usury statute continued to use the phrase "any loan or forbearance." As the court below acknowledged, "when the Legislature utilizes words that have previously been the subject of judicial construction, it is deemed to have used those words in the sense that has been ascribed to them." *Id.* 26a. The legislature was writing in 1960 and in 1981 against the well-established background rule of the time-price doctrine and building upon it, not abrogating it.

But whatever the merits of the court's conclusion, it can scarcely be debated that it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354 (quotations omitted). Its unforeseeable nature is made plain (1) by its candid admission that, under its 1966 decision in *Steffenauer*, "the time price doctrine insulated retail installment sales from usury" laws, App., *infra*, 17a, (2) by its failure to cite a single New Jersey case documenting (even though 25 years have passed since the amendments) this purported abrogation, *but*

see Saul, 572 A.2d at 655 ("RISA effectively codifies the 'time price doctrine.'"), and (3) by the court's express decision to apply its new rules only "prospective[ly]," App., *infra*, 43a—a decision that would be unnecessary if the rules were foreseeable—to most rent-to-own transactions (that is, to the transactions of Rent-A-Center's competitors, with a special exception permitting retroactive application to Rent-A-Center). And the new construction is especially indefensible inasmuch as it involved the interpretation of the *criminal* usury statute. Even in the "noncriminal context," the rule of lenity requires strict construction of a criminal statute's terms. *Leocal*, 543 U.S. at 12 n.8; *see also Dunn*, 442 U.S. at 112. Rule of lenity notwithstanding, the state supreme court here construed the criminal usury statute's term, "interest on a loan," to include time-price differentials in the sale of goods. After four decades of contrary rulings, Rent-A-Center could not have foreseen this change.

b. The New Jersey Supreme Court's judgment is also inconsistent with *Marks*. In *Marks*, the defendants had been charged with several counts of transporting obscene materials in interstate commerce in violation of federal law. 430 U.S. at 189. The federal statute governing obscenity used "sweeping language" to describe what conduct it forbade, so the scope of the statute turned on the confines of First Amendment law. *Id.* at 195. At the time of the alleged offense, the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), controlled, and under it "expressive material [was] constitutionally protected unless it [was] 'utterly without redeeming social value.'" *Marks*, 430 U.S. at 191 (quoting *Memoirs*, 383 U.S. at 418). Before the trial began, though, this Court held in *Miller v. California*, 413 U.S. 15 (1973), that constitutional protection did not extend to a "work [that], taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24. Repeating *Bouie*'s admonition that an "unforeseeable judicial enlargement of a criminal statute, applied retroactively," violates due process, *Marks*, 430 U.S. at 192, this Court concluded that *Miller*'s new test "marked a significant departure from *Memoirs*" and therefore

held that the Due Process Clause precluded applying the new, stricter standards to the defendants' past conduct. *Id.* at 194, 196.

The New Jersey Supreme Court's judgment is inconsistent with *Marks* for the same reasons it is inconsistent with *Bouie*. To say the least, the court's shift marked a "significant departure" from the prior law: the court went from stating in *Sliger* that "[t]he time-price doctrine is firmly imbedded in this state," 283 A.2d at 906—a statement quoted by the Appellate Division in 1990 with the comment that "[t]here has been no judicial or legislative pronouncement since *Sliger* was decided to render the time-price doctrine inapplicable," *Saul*, 572 A.2d at 656—to abrogating the doctrine wholesale. App., *infra*, at 33a. Rather than just changing the scope of the applicable test, as in *Marks*, the decision below adopted the converse of the prior rule. For *Marks*'s "significant departure" to have been a change of similar magnitude, the initial rule would have had to state, "all expressive material is protected under the First Amendment," and the later rule would have had to state, "no expressive material is protected under the First Amendment." The retroactive application of such a significant departure from settled law conflicts with this Court's holding in *Marks*.

c. In *Rogers*, this Court considered the constitutionality of the retroactive application of a state judicial decision abolishing the common-law "year and a day rule." 532 U.S. at 453. In concluding that the abolition of the rule did not violate due process, this Court emphasized the "most tenuous foothold" the rule had in Tennessee's criminal law. *Id.* at 464. Indeed, the Tennessee Supreme Court had "pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the State." *Id.* Rejecting the petitioner's argument that the rule was "firmly entrenched in the common law of Tennessee," *id.* at 465, this Court explained that the rule "was a principle in name only," *id.* at 466; "[f]ar from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking," *id.* at 467.

The New Jersey Supreme Court's decision also conflicts with the reasoning of *Rogers*. Rather than abolishing a tenuous common-law rule that had never served as a ground for decision, it abolished a rule that it had not long ago described as "firmly imbedded" within the State, *Sliger*, 283 A.2d at 906, that had supplied the reasons for decision in two of its own cases, namely *Steffenauer* and *Sliger*, and that the Appellate Division applied as recently as 1994 (in *Saul*) and in 2004 (in this case). The court's decision was far from a routine exercise of common-law decision-making—it was a marked and unpredictable departure from prior precedent. *Rogers*, 532 U.S. at 467.

d. Finally, in *Landgraf*, this Court considered whether new statutory provisions authorizing compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964 applied retroactively to cases already pending on appeal. 511 U.S. at 247. Explaining that introducing a right to compensatory damages was "the type of legal change that would have an impact on private parties' planning," *id.* at 282, this Court emphasized that it had never, in a case in which Congress had not clearly spoken, "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment," *id.* at 284. Moreover, this Court rejected the argument "that retroactive application of a new statute would vindicate its purpose more fully" as "not sufficient to rebut the presumption against retroactivity." *Id.* at 285–86.

The decision of the New Jersey Supreme Court conflicts with the reasoning of *Landgraf*. The decision below changed the law applicable to Rent-A-Center's already completed conduct in such a way that would have had a substantial impact on Rent-A-Center's planning, had it received fair notice. Moreover, the court reached this outcome by relying on the "notion that remedial statutes like RISA should be liberally construed," App., *infra*, 24a, and by reasoning that excluding rent-to-own transactions from "the protective sweep of RISA . . . would be an intolerably narrow interpretation of a statute limned for consumer protective purposes," *id.* 26a. But this

Court explained in *Landgraf* that the possibility "that retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity." 511 U.S. at 285–86. The New Jersey Supreme Court's policy justifications may have been "sufficient to validate [the decision's] prospective application," but it could not, consistent with due process, "suffice[] to warrant its retroactive application." *Id.* at 266; *see also Bouie*, 378 U.S. at 362. By applying its new construction of RISA to Rent-A-Center's past conduct, the court let policy concerns trump due process, a decision that conflicts with the reasoning of *Landgraf*.

The decision of the Supreme Court of New Jersey cannot be reconciled with the decisions of this Court in *Bouie*, *Marks*, *Rogers*, and *Landgraf*. Resolving this conflict on an important issue of federal constitutional law warrants this Court's review. *See* Sup. Ct. R. 10(c).

B. The Decision Below Conflicts With The Decisions Of Federal Courts Of Appeals And Of Another State Supreme Court

The judgment of the New Jersey Supreme Court also conflicts with decisions of the Third Circuit, the Eighth Circuit, and the Ninth Circuit, and with a decision of the California Supreme Court. Each of these courts has applied *Bouie*'s rule that due process is violated by new judicial rules that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354 (quotations omitted). These directly conflicting interpretations of federal law present an independent basis for certiorari. *See* Sup. Ct. R. 10(b).

1.a. In *Helton v. Fauver*, 930 F.2d 1040 (3d Cir. 1991), the Third Circuit confronted the retroactive application of the New Jersey Supreme Court's new construction of a statute that governed trying juveniles as adults. When the defendant, Helton, was 16 years old, he drove the getaway car for a convenience store robbery during which one of his accomplices shot and killed the store's clerk. *Id.* at 1042. At the

time of the crime, the relevant statute permitted trying a juvenile as an adult only if "[t]he court is satisfied that adequate protection of the public requires waiver [of juvenile jurisdiction] *and* is satisfied there are no reasonable prospects for rehabilitation of the juvenile prior to his attaining the age of maturity." N.J. STAT. ANN. § 2A:4-48 (repealed 1983) (emphasis added). Because the juvenile court concluded Helton was a good candidate for rehabilitation, it retained jurisdiction. The State appealed to the New Jersey Supreme Court, where "the New Jersey Supreme Court construed the word 'and,' in N.J.S.A. 2A:4-48, to mean 'or,'" an interpretation that permitted Helton to be tried as an adult. *Helton*, 930 F.2d at 1044. Reviewing a denial of habeas corpus, the Third Circuit noted that the New Jersey Supreme Court's admission that the new rule was "'perhaps not starkly evident before today's decision,'" was "a telling indication" that its new rule was an unforeseeable change in the law. *Id.* at 1047. The Third Circuit concluded that "the language of the statute, together with the line of cases interpreting it in the New Jersey state courts, could not have put Helton on notice of, or made reasonably foreseeable," the New Jersey Supreme Court's new rule. *Id.* Retroactive application of the new rule accordingly violated Helton's due process rights. *Id.* at 1047–48 (citing *Bouie*).

b. In another habeas case, the Eighth Circuit considered whether the Missouri Supreme Court's retroactive application of a new construction of the State's felony-murder rule violated due process. *Moore v. Wyrick*, 766 F.2d 1253, 1254 (8th Cir. 1985). During the petitioner's attempted robbery of a tavern, shooting broke out, and one of the tavern's patrons killed another patron. Petitioner was charged with felony murder, but a "factually indistinguishable" decision by the Missouri Supreme Court held that felony murder occurred only when the defendant or an accomplice committed the killing. *Id.* at 1256. When the petitioner's case reached the Missouri Supreme Court, however, the court enlarged the reach of the felony-murder statute to cover any killing that occurred during a felony, thereby encompassing the peti-

tioner's conduct. *Id.* at 1257. The Eighth Circuit concluded that the Missouri Supreme Court's new decision "effected a significant change in Missouri's felony murder law." *Id.* Relying on *Bouie* and *Marks*, the Eighth Circuit concluded that the change in the law was "constitutionally unforeseeable and thus cannot be applied retroactively." *Id.* at 1258.

c. Similarly, in *United States v. Potts*, 528 F.2d 883 (9th Cir. 1975) (en banc), the Ninth Circuit declined to retroactively apply a new rule of its own creation because it "undoubtedly expand[ed] the scope of potential criminal liability" under federal criminal law. *Id.* at 886. In an earlier decision, the Ninth Circuit had concluded that defendants whose convictions had been expunged did not qualify as felons. *Id.* at 884. In *Potts*, the Ninth Circuit stated that it was "now convinced that [the earlier decision] was wrongly decided and therefore overrule[d] that decision." *Id.* The court declined to apply its ruling to the parties before it, explaining that because the defendant "lacked notice of our subsequently revised view of the statute, due process fairness bars the retroactive judgment of his conduct using the expanded definition." *Id.* at 886 (quotations omitted). "Accordingly," the Ninth Circuit continued, "the rule we announce today must be applied prospectively only, and the dismissal below affirmed." *Id.* (citing *Bouie*).

d. Finally, in *People v. Martinez*, 973 P.2d 512 (Cal. 1999), the California Supreme Court declined to apply retroactively its revision to the rule governing the distance that a kidnapping victim must be moved to satisfy the asportation element of simple kidnapping. *Id.* at 520 & n.6. The California Supreme Court concluded that the defendant had not satisfied the element as defined in prior case law (*i.e.*, he moved his victim only 65 feet, while an earlier decision held that a movement of 75 feet was insufficient as a matter of law), and "he had no fair warning it would be [redefined]." *Id.* at 523 (citing *Bouie*). The court stated that, "in determining their conduct," citizens "were entitled to rely" upon "the rule of law as announced by the state's highest court." *Id.* at 522. Noting that "[t]he mere possibility that this court might

reconsider its own precedent is not the equivalent of actually overruling it," *id.* (quotations omitted), the court did "not apply the holding retroactively to the defendant," *id.* at 514.

2. The New Jersey Supreme Court's opinion conflicts with the reasoning and the holdings of each of these decisions. Although its prior decisions in *Steffenauer* and *Sliger* each concluded that sales transactions *did not* fall within the scope of usury law, the New Jersey Supreme Court, after concluding that the transactions at issue qualified as retail installment sales, decided that Rent-A-Center's transactions *did*. This marked a "significant change" in the law, *Moore*, 766 F.2d at 1257, that enlarged Rent-A-Center's liability, *see id.*; *Potts*, 528 F.2d at 886; *Martinez*, 973 P.2d at 523, in a way it could not have foreseen. *Helton*, 930 F.2d at 1048; *Moore*, 766 F.2d at 1258; *Potts*, 528 F.2d at 886; *Martinez*, 973 F.2d at 523. In the decision below, as in *Moore*, no intervening rulings changed the long-standing judicial construction that exempted installment sales of goods from usury law, yet the New Jersey Supreme Court applied its unforeseeable new construction (that usury laws could apply to installment sales) to Rent-A-Center retroactively. 766 F.2d at 1258. And as in *Helton*, the language of the relevant statutes, together with a line of cases interpreting them, could not have afforded notice of the change in the law. *Helton*, 930 F.2d at 1047. Here, the New Jersey Supreme Court admitted that "Perez's rent-to-own contracts are not a perfect fit" for RISA, App., *infra*, 22a, a concession that is "a telling indication" that its holding constitutes "an unforeseeable change in the law." *Helton*, 930 F.2d at 1047.

Rent-A-Center was entitled to rely on the prior decisions of the State's highest court, *see Martinez*, 973 P.2d at 522, and to order its affairs within the boundaries they set out. The new rules adopted by the New Jersey Supreme Court were "constitutionally unforeseeable," *Moore*, 766 F.2d at 1258, and thus their retroactive application violated Rent-A-Center's due process rights and conflicted with the decisions of the Third Circuit, the Eighth Circuit, the Ninth Circuit, and the Supreme Court of California.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

Hilda PEREZ, on Behalf of Herself and All Others Similarly Situated, Plaintiff-Appellant,

v.

RENT-A-CENTER, INC., Defendant-Respondent.

Supreme Court of New Jersey.

Argued Nov. 7, 2005.

Decided March 15, 2006.

Seth R. Lesser, New York, NY, argued the cause for appellant (Locks Law Firm, Williams Cuker & Berezofsky and William A. Riback, attorneys; Mr. Lesser, Mr. Riback and Mark R. Cuker, Philadelphia, PA, on the briefs).

Ezra D. Rosenberg argued the cause for respondent (Dechert, attorneys; Mr. Rosenberg, David A. Kotler and Thomas Kane, Princeton, on the briefs).

Melville D. Miller, Jr., President, argued the cause for amicus curiae Legal Services of New Jersey (Mr. Miller, attorney; David G. McMillin and Christopher Hill, on the briefs).

Michaelene Loughlin, Hackensack, submitted a brief on behalf of amicus curiae Consumers League of New Jersey (Loughlin & Latimer, attorneys).

Steven L. Wittels, Armonk, submitted a brief on behalf of amici curiae National Consumer Law Center, Consumer Federation of America, New Jersey Public Interest Research

Group Citizen Lobby and U.S. Public Interest Research Group (Sanford Wittels & Heisler, attorneys).

Justice LONG delivered the opinion of the Court.

On this appeal, we have been asked to determine whether rent-to-own contracts are subject to certain consumer protection statutes. Specifically, the parties question whether the Retail Installment Sales Act ("RISA"), *N.J.S.A.* 17:16C-1 to -61; the interest rate cap in the criminal usury statute, *N.J.S.A.* 2C:21-19; and the Consumer Fraud Act ("CFA"), *N.J.S.A.* 56:8-1 to -135, apply to such arrangements. The trial judge answered those questions in the negative and the Appellate Division affirmed. Having concluded, based on the plain language of the relevant statutes and established principles of statutory interpretation, that Rent-A-Center's rent-to-own contracts are subject to each of the denominated acts, we now reverse.

I

The rent-to-own industry, in its present iteration, is generally traced back to a "retail appliance store owner whose customers were being denied credit to purchase washers and dryers." Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates v. the Rent-to-Own Industry: Reaching a Reasonable Accomodation*, 34 *Am. Bus. L.J.* 385, 385 (1997). Today, rent-to-own is a multi-billion dollar business that consists of

> dealers that rent furniture, appliances, home electronics, and jewelry to consumers. Consumers enter into a self-renewing weekly or monthly lease for the rented merchandise, and are under no obligation to continue payments beyond the current weekly or monthly period. At the end of each period, the consumer can continue to rent by paying for an additional period, or can return the merchandise. The

> lease provides the option to purchase the goods, either by continuing to pay rent for a specified period of time, usually 12 to 24 months, or by early payment of some specified proportion, usually 50 to 60 percent, of the remaining lease payments.
>
> Rent-to-own transactions offer immediate access to household goods for a relatively low weekly or monthly payment, typically without any down payment or credit check. These terms are attractive to many consumers who cannot afford a cash purchase, may be unable to qualify for credit, and are unwilling or unable to wait until they can save for a purchase.
>
> [Federal Trade Commission, *Bureau of Economics Staff Report: Survey of Rent-to-Own Customers* 1–2 (April 2000) (footnotes omitted) (hereinafter *FTC Report*).]

Generally, rent-to-own customers engage in such transactions in order to possess consumer goods that they need and cannot obtain through ordinary means. Price Waterhouse LLC, *THORN Americas—New Jersey Customer Survey Report* III-17 (November 19, 1996) (hereinafter *Price Waterhouse Survey*) (Rent-A-Center survey showing over 72% of New Jersey Rent-A-Center customers could not afford to purchase item at traditional retail store); Kathleen E. Keest *et al.*, *Interest Rate Regulation Developments: High-Cost Mortgages, Rent-to-Own Transactions, and Unconscionability*, 50 *Bus. Law.* 1081, 1086 (1995) ("Rent-to-own agreements are typically entered into by customers who can neither afford to purchase the merchandise outright nor obtain credit."). Indeed, nationally, rent-to-own customers are more likely to be "African American, younger, less educated, have lower incomes, have children in the household, rent their

residence, live in the South, and live in non-suburban areas." *FTC Report*, *supra*, at ES-1.

Although some consumers enter into rent-to-own transactions to fill a temporary need or to try a product out before buying it, *id.* at 2, the vast majority are the working poor whose incomes are on the margin of economic stability; they engage in rent-to-own for ownership purposes. *Id.* at ES-2 ("Sixty-seven percent of customers intended to purchase the merchandise when they began the rent-to-own transaction."); Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury in Today's Society*, 51 *S.C. L. Rev.* 589, 635–36 (2000); *see also Price Waterhouse Survey*, *supra*, at III-17. In fact, studies, including those by Rent-A-Center, have concluded that between 64% and 70% of all rent-to-own merchandise is ultimately purchased by the customers. *FTC Report*, *supra*, at ES-1; Patrick A. Gaughan, Ph.D. & Henry L. Fuentes, C.P.A., *An Analysis of the Product Offerings of Rent-A-Center, Inc. Perez et al. v. Rent-A-Center, Inc.* 8 (Oct. 3, 2003).

Rent-A-Center is the nation's largest rent-to-own company, *Gaughan*, *supra*, at 4, with approximately fifty stores in New Jersey alone. *Id.* at 9–10. Between March 2001 and May 2002, Plaintiff, Hilda Perez, entered into five rent-to-own contracts with Rent-A-Center in order to become the owner of used furniture, a used washer and new dryer, a used DVD player and television, a new computer, and a used large screen television and cabinet. *Perez v. Rent-A-Center, Inc.*, 375 *N.J. Super.* 63, 70, 866 *A.*2d 1000 (App. Div. 2005). Those transactions were documented by the Appellate Division as follows:

Agreement Number	Date	Product	Cash Price	Weekly Rate[1]	Weeks to Ownership	Total Rent-to-Own Cost[2]	Amount Perez Paid[3]
34413883	03/03/01	Furniture	$1,951.43	$38.99	91.4	$3,902.76	$2,573.34
34414122	04/23/01	Washer/dryer	987.47	21.99	95.3	1,984.90	1,418.71
34414671	08/03/01	DVD/TV	1,160.99	22.99	92.0	2,321.99	1,264.39
34415583	11/17/01	Computer	2,235.48	42.99	95.0	4,470.96	1,934.49
34416433	05/06/02	big-screen TV & cabinet	2,966.35	45.99	120.0	5,932.71	965.79
Totals			$9,301.72	$172.95		$18,613.32[4]	$8,156.72

[*Id.* at 70, 866 A.2d 1000.]

The contract for the washer and dryer is representative of all others. It states:

> THIS IS A RENTAL AGREEMENT ONLY
>
> This is a rental agreement only. You will not acquire any equity in the property by making rental payments. You have not agreed to purchase this property, and will not acquire any ownership rights in it unless you have, at your option, paid the total of rental payments plus

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1 The "weekly rate" is the weekly rental rate without tax or other fees (such as an "optional liability waiver fee" that the record reflects Perez often paid).

2 The contracts assume all payments are made on a weekly basis, and include payment of the contract's "fair market value" cost of the product at the end of the rental period; the figure does not include tax.

3 The "amount Perez paid" was derived from the rental summaries provided in the record (the amount indicated under the heading Rent Paid). There is no rental summary for the furniture rental. Therefore, the "amount Perez paid" for the furniture rental was derived by adding the rent payments (exclusive of tax and other fees) identified in the rental summary.

4 The "$28,613.32" stated by the Appellate Division is a typographical error. The correct total is $18,613.32.

the option payment necessary to acquire ownership.

. . . .

4. OWNERSHIP: We own the property you are renting. You will not acquire any ownership rights in the property unless you have, at your option, paid the total of payments plus the purchase option price necessary to acquire ownership as set forth below, or exercise the early purchase option described below. If you want to purchase this or similar property now, you may be able to get cash or credit terms from other sources which will result in a lower total cost than the rental payments, plus the purchase option price provided for below.

OPTION TO PURCHASE: If you renew this Agreement for 95.3 successive weeks, you will pay a total of $1,820.33 or if you renew this Agreement for 44.0 successive semi-months, you will pay a total of $1,793.07 or if you renew this Agreement for 22.0 successive months, you will pay a total of $1,671.12 and you will have the option to purchase the property for its then fair market value. For purpose of this option, this price will not exceed $164.57. Thus, in order to acquire ownership of this item, you must pay the total amount of $1,984.90 if you pay weekly rental payments, or $1,957.64 if you pay semi-monthly rental payments, or $1,835.69 if you pay monthly rental payments. Figures do not include tax.

COST OF RENTAL WITH OPTION TO PURCHASE: The difference between the amount of the cash price and the total amount of all the rental payments under this agree-

> ment is $997.43 if you pay weekly, or $970.17 if you pay semi-monthly, or $848.22 if you pay monthly, which includes the option to purchase price described above. Figures do not include tax.
>
> 5. OUR CASH PRICE FOR THIS PROPERTY is $987.47. This price may be different from the MSRP or other available retail prices.
>
> 6. EARLY PURCHASE OPTION: If you wish to purchase the rental property, you may do so at any time by the payment of 50% of the remaining rental payments calculated at that time, plus 50% of the option to purchase amount described above.

Under the contracts, Perez paid a pre-calculated weekly rental amount, a portion of which defrayed the price of the goods. She could return the goods at any time and stop making payments. However, in order to purchase them, Perez agreed that she would pay an amount equal to or in excess of their value along with a purchase option price. If Perez chose to purchase the rental property early, she was required to pay a prorated portion of the remaining rental payments and option price. Together, all the items Perez rented had a cash price of $9,301.72; however, if she paid the weekly rates and the additional option payments, she would assume ownership having expended $18,613.32. The difference between the market value of the goods and their ultimate cost was Rent-A-Center's interest charge for the privilege of buying the

products over time.[5] By May 2002, Perez had paid $8,156.72. It was at that point that she stopped paying.

Rent-A-Center thereafter filed a small claims complaint seeking money damages against Perez arising out of her failure to pay for or return the rental items.[6] *Perez*, *supra*, 375 *N.J. Super.* at 67, 866 *A.*2d 1000. In turn, Perez sued Rent-A-Center in the Superior Court, alleging that her rent-to-own contracts violated RISA and the CFA because the contracts imposed an interest rate in excess of the 30% permitted under the criminal usury statute. *Id.* at 68, 866 *A.*2d 1000. Rent-A-Center counterclaimed for breach of contract and conversion. *Ibid.* In 2004, Perez moved for partial summary judgment declaring the applicability of RISA and the usury cap, and Rent-A-Center filed a cross-motion for dismissal of the com-

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[5] The Appellate Division noted the following findings by Perez's expert:

> James Hunt, an actuary, calculated interest rates for several of Perez's rental agreements with Rent-A-Center, assuming she made all payments contemplated by the agreements. He opined that: (1) for the washer and dryer, the annual interest rate was 79.9%; and (2) for the furniture, the annual interest rate was 82.7%. The annual interest rate for the DVD player fell somewhere between 79.9% and 82.7%. Hunt was of the opinion that interest rate calculations were valid even if the items were rented for only one week, as long as there remained the option to buy.
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> [*Perez v. Rent-A-Center, Inc.*, 375 *N.J. Super.* 63, 74, 866 *A.*2d 1000 (App. Div. 2005).]

[6] Although the record is somewhat unclear, Rent-A-Center appears to have voluntarily dismissed the small claims complaint. *See Perez*, *supra*, 375 *N.J. Super.* at 67, 866 *A.*2d 1000.

plaint. *Ibid.* The trial judge granted the relief sought by Rent-A-Center and dismissed Perez's complaint in its entirety. *Ibid.*

Perez appealed arguing (1) that Rent-A-Center was collaterally estopped from defending against the RISA claim;[7] (2) that RISA, by its plain terms, applies; and (3) that the usury limitations are applicable to Rent-A-Center's operations. The Appellate Division rejected Perez's collateral estoppel argument and ruled in favor of Rent-A-Center on the merits. We granted Perez's petition for certification, 183 *N.J.* 586, 874 *A.*2d 1105 (2005), along with the application of Legal Services of New Jersey and National Consumer Law Center *et al.*, to appear as amicus curiae.

II

Perez argues that Rent-A-Center is barred under the doctrine of collateral estoppel from defending against the RISA claim and that RISA and the usury cap are applicable to Rent-A-Center's contracts. She also contends that the Appellate Division erred in failing to separately address her CFA claim. Amici support Perez's arguments.

Rent-A-Center counters that because the prior litigation was settled, the doctrine of collateral estoppel does not apply; that its transaction with Perez constitutes a series of short-term leases to which neither RISA nor the usury statute applies; and that if RISA is held to apply, Perez cannot maintain a CFA claim.

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[7] In support she cited *Robinson v. Thorn Am., Inc.*, L-03697-94 (Law Div. Oct. 20, 1995), a class action law suit involving many of the same issues that are before us. *See infra* Part III.

III

We turn first to Perez's procedural claim that Rent-A-Center is barred by the doctrine of collateral estoppel from arguing that its contracts are not governed by RISA. At the heart of that claim is the disposition in *Robinson v. Thorn Am., Inc.*, a case involving Rent-A-Center. There, the trial judge ruled on summary judgment that Rent-A-Center's contracts fit within RISA's definition of "retail installment contract." *See N.J.S.A.* 17:16C-1(b). Rent-A-Center appealed and the execution of the judgment was stayed. During the pendency of the appeal, the case settled. With the consent of the parties, the Appellate Division dismissed the case without prejudice and remanded it to the trial judge for further proceedings.

On remand, the details of the settlement were hammered out. Rent-A-Center consented to pay money damages to plaintiffs and to amend its New Jersey rental agreements to conform to RISA, on the condition that the settlement be construed neither as an admission nor as evidence of wrongdoing. After a hearing pursuant to *Rule* 4:32-4, final judgment was entered in accordance with the settlement, dismissing plaintiff's claims against Rent-A-Center "in their entirety, with prejudice and without costs to any party."

Perez argues that the summary judgment order entered in *Robinson* collaterally estops Rent-A-Center from relitigating the RISA issue. Under New Jersey law

> [c]ollateral estoppel applies if the issue decided in the prior action is identical to the one presented in the subsequent action, if the issue was actually litigated—that is, there was a full and fair opportunity to litigate the issue—in the prior action, if there was a final judgment on the merits, if the prior determination was essential to the judgment, and if the party against whom preclusion is asserted was a

> party, or in privity with a party, to the proceeding.
>
> [*Fama v. Yi*, 359 *N.J. Super.* 353, 359, 820 *A.*2d 65 (App. Div.), *certif. denied*, 178 *N.J.* 29, 834 *A.*2d 403 (2003) (citing *Pace v. Kuchinsky*, 347 *N.J. Super.* 202, 215, 789 *A.*2d 162 (App. Div. 2002); *Barker v. Brinegar*, 346 *N.J. Super.* 558, 567, 788 *A.*2d 834 (App. Div. 2002)).]

Although issue preclusion may be denied on equitable grounds even when the five elements of collateral estoppel are satisfied, *ibid.*, when they are not satisfied, the inquiry ends. The threshold concern here is whether the summary judgment in *Robinson* constituted a final judgment on the merits warranting issue preclusion. Rent-A-Center argues, and the Appellate Division agreed, that the summary judgment was effectively, if not explicitly, vacated by the later judgment dismissing plaintiff's claims in accordance with the settlement. The Appellate Division ruled:

> Entry of the judgment based upon the court-approved settlement agreement had the effect of superceding the initial "final judgment" on the merits. Whether or not the second final judgment explicitly stated this effect is irrelevant. The parties in settling the matter, and the court in approving the settlement, clearly intended to supercede the initial final judgment, and the court effected that result through entry of the second final judgment.
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> [*Perez*, *supra*, 375 *N.J. Super.* at 77 n. 10, 866 *A.* 2d 1000.]

Although we agree that collateral estoppel was properly rejected by the trial judge, some additional comments are in order.

It is well-established that the mere happenstance of settlement does not automatically warrant the conclusion that a prior judgment entered in a case has been vacated:

> Where mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. . . . The denial of vacatur is merely one application of the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.
>
> . . . .
>
> . . . Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand *unless a court concludes that the public interest would be served by a vacatur.*
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> [*U.S. Bancorp. Mortgage Co. v. Bonner Mall P'ship*, 513 *U.S.* 18, 25–26, 115 *S. Ct.* 386, 392, 130 *L. Ed.* 2d 233, 242–43 (1994) (internal quotations and citations omitted) (emphasis added).]

In other words, the settlement of a case after the entry of judgment does not automatically relieve the party against whom the judgment was entered from its legal effects. In order to assure that that judgment will not be used against it in the future, the losing party should file a vacatur motion.[8]

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[8] When a case settles while on appeal, an appellate court, faced with an application to vacate the underlying judgment, should or-

[Footnote continued on next page]

Ibid. Obviously, once a vacatur motion is granted, collateral estoppel will not apply, because the requisite judgment on the merits will be lacking. *Aetna Cas. & Sur. Co. v. Ply Gem Indus., Inc.*, 313 *N.J. Super.* 94, 107, 712 *A.*2d 717 (Law Div. 1997) (holding a vacated judgment has no preclusive effect).

In *Robinson*, no motion was made to vacate the summary judgment and consequently no vacatur order was entered. Generally, that would end the matter because judicial precedents are important to lawyers and judgments ordinarily should not be obliterated by implication. *U.S. Bancorp., supra*, 513 *U.S.* at 25–26, 115 *S. Ct.* at 392, 130 *L. Ed.* 2d at 242–43. However, we agree with the Appellate Division that, despite the absence of an unequivocal vacatur order, the "Final Order and Judgment" entered upon the settlement in *Robinson* was intended to supercede the earlier partial summary judgment.

Indeed, the settlement order specifically references the summary judgment yet declares: "[T]his is a Final Order and Judgment for purposes of appeal." The order goes on to state that if "the Settlement is not consummated for any reason whatsoever, then the Final Order and Judgment shall be null and void *ab initio*, and of no force or effect, and that the matter shall be returned to the Appellate Division for continued pursuit of the appeal." That provision in turn, reflects ¶ 53 of the stipulation of settlement, which prescribes that in the event that the settlement is nullified, "the *Robinson* case shall stand in the same position, without prejudice, as if [the]

[Footnote continued from previous page]

dinarily stay its hand and remand the matter to the trial court for consideration of the vacatur request. *See U.S. Bancorp. Mortgage Co. v. Bonner Mall P'ship*, 513 *U.S.* 18, 29, 115 *S. Ct.* 386, 393, 130 *L. Ed.* 2d 233, 244 (1994).

stipulation had not been made or filed with the Court." The fair implication of that language is that the earlier summary judgment was to be considered void if the settlement stood but revived if it failed.

Most importantly, the settlement order states in ¶ 21:

> This Order and Judgment and the Stipulation of Settlement and all papers related to them are not, and *shall not be construed to be, an admission by any of the Defendants of any liability or wrongdoing whatsoever, and shall not be offered as evidence of any such liability or wrongdoing in this or any future proceeding.*

In other words, the parties agreed that the settlement itself would not be used against Rent-A-Center either as an admission or by way of collateral estoppel. In the face of that language, it seems clear that they had no expectation that the earlier summary judgment would survive and continue to trigger issue preclusion. To be sure, the better course would have been for Rent-A-Center to move to vacate the earlier judgment. Nevertheless, we are satisfied that the settlement order was intended by the parties and the judge who approved it to operate to vacate the earlier summary judgment. In short, we hold that Rent-A-Center is not collaterally estopped from defending against the RISA claim Perez has leveled against it.

IV

We turn next to the merits and address the question of whether the rent-to-own contracts between Rent-A-Center and Perez are "retail installment contract[s]" within the meaning of RISA. *N.J.S.A.* 17:16C-1(b). We begin with that issue because, although RISA itself does not expressly contain an interest rate cap, Perez argues that it is the vehicle

through which the Legislature imposed the 30% cap in the criminal usury statute[9] on retail installment sales.

A.

Historically, the law treated the taking of interest in connection with the sale of goods as entirely different from the taking of interest on a loan of money per se. Indeed, in the nineteenth and early twentieth centuries, courts first distinguished between the two kinds of loans and decided that the latter required regulation but the former did not. *Beete v. Bidgood*, 7 *B. & C.* 453, 108 *Eng. Rep.* 792 (K.B.1827) (usury laws inapplicable to higher purchase price charged in exchange for buyer's ability to pay purchase price in installments over time); *Hogg v. Ruffner*, 1 *Black* 115, 66 *U.S.* 115, 118–19, 17 L.Ed. 38, 39–40 (1861) (same). The rationale behind those cases was the notion that the compulsion facing an individual who owes or needs money is much more compelling than that motivating a person who seeks to buy goods, the latter having the option of foregoing the purchase. *See, e.g.*, *General Motors Acceptance Corp. v. Weinrich*, 218 *Mo. App.* 68, 262 *S.W.* 425, 428 (1924) ("[A] purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller."). On that basis, courts concluded that although money lenders were subject to the usury laws, those who made loans to sell their merchandise were not. James A. Ackerman, *Interest Rates and the Law: A History of Usury*, 27 *Ariz. St. L.J.* 61, 94 (1981).

The idea that the two types of loans were distinct was reflected in the judicial coining of the term "time price differential." James P. Nehf, *Effective Regulation of Rent-to-Own*

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[9] The 16% civil usury interest ceiling, *N.J.S.A.* 31:1-1(a), has not been raised by Perez and is not at issue in this case.

Contracts, 52 *Ohio St. L.J.* 751, 785 n.144. Courts used that term to refer to interest incurred in connection with the time sales of goods thus guaranteeing that such sales would escape the usury statutes that by their terms only governed "interest." *See* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 *J. Legal Stud.* 283, 303 (1995) ("[C]ourts generally upheld retail installment contracts, on the ground that usury laws prohibit excessive interest on money loans, not on loans of goods."). Eventually the term "time price differential" made its way into the statutes.[10]

Legal scholars have challenged the economic basis for drawing a distinction between interest and a time price differential—concluding that the time price differential is nothing more than interest on a loan in the amount of the purchase price extended by a seller to a borrower. Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 *Hous. L. Rev.* 721, 727 (1994) ("[T]he 'time price' exemption . . . employed the strained judicial fiction that merchants don't receive 'interest' when selling their goods on time. Merchants charging more for goods paid over

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[10] The term appeared in the precursor to RISA. *L.* 1948, *c.* 419. *N.J.S.A.* 17:16C-1(l) defines "time price differential" as

> the amount or amounts, however denominated or computed, in addition to the cash price or prices, to be paid by the retail buyer for the privilege of purchasing goods or services pursuant to a retail installment contract or a retail charge account. The term does not include the amount, if a separate charge is made therefore, for insurance and official fees.

time than goods purchased for cash were thus freed from usury."); *see* 15 *Corbin on Contracts* § 87.4 (Bender ed. 2003); National Consumer Law Center, *The Cost of Credit: Regulation and Legal Challenges* 50 (hereinafter *Cost of Credit*) (2d ed. 2000); *Ackerman*, *supra*, 27 *Ariz. St. L.J.* at 88; *see also Hare v. General Contract Purchase Corp.*, 220 *Ark.* 601, 249 *S.W.*2d 973, 978 (1952) ("Buying at a credit price, as distinguished from a cash price . . . is being used as a cloak for usury in many cases by such words as 'time price differential,' or some other such language."). Commentators have also debunked the "compulsion" rationale, concluding that the need for the basic necessities of life is no less compelling than the need for money *per se*. *See Cost of Credit*, *supra*, at 50; *Ackerman*, *supra*, 27 *Ariz. St. L.J.* at 88.

However, the view that the time price doctrine insulated retail installment sales from usury continued to have currency in America through the mid-twentieth century. *See*, *e.g.*, *Hogg*, *supra*, 66 *U.S.* at 118–19, 17 *L. Ed.* at 39–40; *Steffenauer v. Mytelka & Rose, Inc.*, 87 *N.J. Super.* 506, 511, 210 *A.*2d 88 (Ch. Div. 1965) (citing New York, Pennsylvania, Delaware, District of Columbia, Connecticut, and Rhode Island cases subscribing to the time price doctrine). In fact, the charges associated with the credit sale of goods went generally unregulated up until the 1950s. At that point, in response to the drumbeat of scholarly criticism and consumer complaints, some states, including New Jersey, recognized that the credit sale of goods required regulation and began to adopt retail installment sales acts that set interest rate limits on credit sales transactions. *See* 15 *Corbin on Contracts* § 87.4 (Bender ed. 2003); *Ackerman*, *supra*, 27 *Ariz. St. L.J.* at 94; *Nehf*, *supra*, 52 *Ohio St. L.J.* at 785 n. 144 (citing Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 *Mich. L. Rev.* 1285, 1295 (1966)). Through the incorporation of interest rate caps, those enactments effectively repudiated the historic treatment accorded the credit sale of goods

and essentially replaced the usury laws that had been previously declared off-limits.

Like other state initiatives, New Jersey's RISA, which became law in 1960, was "part of a package of laws designed to protect consumers from overreaching by others, to protect consumers from overextending their own resources and also to promote the availability of financing to purchase various goods and services." *Girard Acceptance Corp. v. Wallace*, 76 *N.J.* 434, 439, 388 *A.*2d 582 (1978). Among other things, the statute prescribed the general form that retail installment contracts should take, *N.J.S.A.* 17:16C-21 to -25; required certain financial disclosures, *N.J.S.A.* 17:16C-27; detailed prohibited practices, *N.J.S.A.* 17:16C-35 to -39; and imposed a 10% cap on the time price differential (interest) chargeable in connection with a sale, *L.* 1960, *c.* 40, § 41. Penalties for violation were also provided. *N.J.S.A.* 17:16C-38.3.

B.

At issue is whether Perez's transaction with Rent-A-Center constitutes a retail installment sales contract.[11] RISA defines a "retail installment contract" as follows:

> "Retail installment contract" means any contract, other than a retail charge account or an instrument reflecting a sale pursuant thereto, entered into in this State between a retail seller and a retail buyer evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes, or any part thereof, in

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[11] Most other states have enacted statutes dealing specifically with the rent-to-own industry. *Perez, supra*, 375 *N.J. Super.* at 88-91, 866 *A.*2d 1000.

> two or more installments over a period of time. This term includes a security agreement, chattel mortgage, conditional sales contract, or other similar instrument and any contract for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of such retail installment contract.
>
> [*N.J.S.A.* 17:16C-1(b).]

The first sentence of the Act describes a covered sale. Briefly, the contract must be entered into between a retail seller and a retail buyer; it must evidence an agreement to pay the retail purchase price of goods in installments; and the goods must be for personal, family, or household use. The second sentence of the Act is a catch-all by which the Legislature declared that instruments analogous but not identical to pure retail installment sales would also fall within the Act. By way of example, the Legislature named security agreements, chattel mortgages, and conditional sales. Also included was the category of "similar instruments," which was obviously intended to sweep in agreements that might not squarely fit into one of the previously described categories but which approximated them. Certain leases were included as well, presumably because the Legislature recognized that a transaction denominated as a lease could be, in substance, a retail installment sale. The question presented is whether Perez's rent-to-own contracts with Rent-A-Center are instruments covered by RISA.

It is uncontroverted that the leased goods at issue here are of the type described in RISA—for family, personal, or

household use and that that provision of the Act requires no further explication by us. Neither are the definitions of "retail seller" and "retail buyer," standing alone, of special interest. RISA defines a "retail seller" as

> a person who sells or agrees to sell goods[12] or services under a retail installment contract or a retail charge account to a retail buyer, and shall include a motor vehicle installment seller.
>
> [*N.J.S.A.* 17:16C-1(c).]

RISA defines a "retail buyer" as

> a person who buys or agrees to buy goods or services from a retail seller, not for the purpose of resale, pursuant to a retail installment contract or retail charge account.
>
> [*N.J.S.A.* 17:16C-1(d).]

As the Appellate Division acknowledged, those "definitions are circular because they refer back to the phrase 'retail installment contract,' which is a separately defined term under RISA." *Perez*, *supra*, 375 *N.J. Super.* at 80, 866 *A.*2d 1000. In other words, whether Rent-A-Center fits the definition of "retail seller" and Perez fits the definition of "retail

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12 RISA defines "goods" as

> all chattels personal which are primarily for personal, family or household purposes, including merchandise certificates and coupons to be exchanged for goods or services, having a cash price of $10,000.00 or less, but not including money or other choses in action. Goods shall not include chattels personal sold for commercial or business use.
>
> [*N.J.S.A.* 17:16C-1(a).]

buyer" depends on whether their transaction is consistent with RISA's description of a "retail installment contract." That issue of statutory interpretation is the nub of the case.

C.

We turn again to the second sentence of *N.J.S.A.* 17:16C-1(b):

> This term includes a security agreement, chattel mortgage, conditional sales contract, or other similar instrument and any contract for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of such retail installment contract.
>
> [*N.J.S.A.* 17:16C-1(b).]

Rent-A-Center first argues, and the Appellate Division agreed, that the lease with Perez falls outside of RISA because it does not reflect "an absolute and unequivocal obligation on the part of Perez to purchase the items she leased." We disagree. There is nothing in RISA that mandates an "absolute and unequivocal obligation" to purchase. Indeed, the last clause of *N.J.S.A.* 17:16C-1(b) says just the opposite. It states that a RISA contract includes a lease, pursuant to which the bailee or lessee is "bound to become or has the *option of becoming*, the owner of such goods upon full compliance with the terms of such retail installment contract." *N.J.S.A.* 17:16C-1(b) (emphasis added). Obviously, if the lessee has the "option" to purchase goods, then, by definition, he or she has the "option" not to purchase them. Accordingly, reading the statute as a whole, it seems clear that the Legisla-

ture never intended an "absolute" or "unequivocal" obligation on the part of the customer to buy the goods.

Alternatively, Rent-A-Center contends that even if RISA does not require an absolute obligation to *purchase* the goods, it plainly requires an obligation by the lessee to pay "a sum equivalent to or in excess of the retail value of the goods." According to Rent-A-Center, that is a condition separate from the option to purchase, as evidenced by the Legislature's conjoining the phrases with the word "and." Because Rent-A-Center's leases do not obligate a lessee to pay a sum certain and the lessee is free to cancel at any time without having incurred debt, Rent-A-Center maintains that the transaction falls outside the plain language of RISA.

Perez counters that she agreed to pay "a sum substantially equivalent to or in excess of the value of the goods" in order to exercise the option to purchase, and that that broadly satisfies the statutory language. She further argues that the right to cancel is of no consequence.

Certainly, it would be fair to say that in this respect Perez's rent-to-own contracts are not a perfect fit with the words of the statute. Consequently, we are faced with the problem recognized by Chief Justice Weintraub in *New Capitol Bar & Grill Corp. v. Div. of Emp. Sec.*, 25 *N.J.* 155, 135 *A.*2d 465 (1957), when he said:

> It is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design.
>
> [*Id.* at 160, 135 *A.*2d 465.]

Our obligation in such a circumstance is to interpret the statute reasonably to serve its apparent legislative purpose. In furtherance of that goal, we long ago established that

in the quest for the intention, the letter gives way to the rationale of the expression. The words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms. The particular words are to be made responsive to the essential principle of the law. When the reason of the regulation is general, though the provision is special, it has a general acceptation. The language is not to be given a rigid interpretation when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the evident legislative design. The will of the lawgiver is to be found, not by a mechanical use of particular words and phrases, according to their actual denotation, but by the exercise of reason and judgment in assessing the expression as a composite whole. The indubitable reason of the legislative terms in the aggregate is not to be sacrificed to scholastic strictness of definition or concept. *Wright v. Vogt*, 7 *N.J.* 1 [80 *A.*2d 108] (1951). It is not the meaning of isolated words, but the internal sense of the law, the spirit of the correlated symbols of expression, that we seek in the exposition of a statute. The intention emerges from the principle and policy of the act rather than the literal sense of particular terms, standing alone. *Caputo v. Best Foods, Inc.*, 17 *N.J.* 259 [111 *A.*2d 261] (1955).

[*Alexander v. N.J. Power and Light Co.*, 21 *N.J.* 373, 378–79, 122 *A.*2d 339 (1956).]

In enacting RISA, the stated legislative purpose was protection of the public interest through the regulation of the charges associated with the time sale of goods. By including conditional sales, chattel mortgages, security interests, leases, and similar instruments within RISA's protective ambit, the Legislature signaled that it intended to sweep into the Act as many cognate agreements as possible, even those that did not strictly fall within a denominated category. That broad mandate, along with the well-established notion that remedial statutes like RISA should be liberally construed to achieve their salutary aims, *Barratt v. Cushman & Wakefield*, 144 *N.J.* 120, 127, 675 *A.*2d 1094 (1996), require questions regarding the applicability of the statute to be resolved in favor of consumers for whose protection RISA was enacted.

So instructed, we are satisfied that the language of RISA was intended to cover agreements like the ones between Rent-A-Center and Perez. Like most rent-to-own consumers, Perez entered into the transactions with Rent-A-Center in order to become the owner of the goods. She took possession of the goods pursuant to instruments that renewed automatically and that were reflected on Rent-A-Center's books, not as weekly leases, but as long term arrangements of 90 to 120 weeks, respectively. A portion of each of Perez's payments was assigned to defray the cost of the goods. The remainder of each payment was interest for the privilege of paying for the goods in installments. Perez "agreed" that she would have to pay the value of the goods in order to own them. In fact, she would receive title upon the fulfillment of the lease provisions: payment of the value of the goods and exercise of the option by the proffer of the option price. Although Perez could choose not to complete the contract, the entire transaction was structured with ownership as its goal. Thus, on the continuum from pure lease to pure sale, we view Perez's arrangements with Rent-A-Center as closer to the latter than to the former.

Our conclusion is undergirded by the lease clause when read in the context of two of the denominated RISA categories: "conditional sales" and "similar instruments." A sale is conditional when possession of the goods is transferred to the buyer who will receive title at some future time upon payment of the full price or upon the happening of some other condition or contingency. If the contingency or condition is not satisfied, title will not pass.[13] That definition is fully descriptive of Perez's leases. Possession of the goods was transferred to her with title to pass upon the satisfaction of the lease terms and the payment of the option price. If she ceased paying, title would not pass. Indeed, Perez's leases are similar in form to transactions that have been judicially recognized as conditional sales. *Nat'l Cash Register Co. v. Daly*, 80 *N.J.L.* 39, 76 *A.* 325 (N.J. Sup. Ct. 1910) (finding cash register contract giving lessee option to purchase for deposit amount at end of lease conditional sale); *Lauter Co. v. Isenreath*, 77 *N.J.L.* 323, 72 *A.* 56 (N.J. Sup. Ct. 1909) (finding piano contract retaining title in lessor until all payments made and allowing repossession at any time upon any non-payment conditional sale); *Albert Lifson & Sons, Inc. v. Williams*, 10 *N.J. Misc.* 982, 984, 162 *A.* 129 (Ct. Equity 1931) (finding furniture lease agreement ending in reposession upon non-compliance and ownership upon compliance conditional sale); *see also In re Vandewater & Co.*, 219 *F.* 627 (D.N.J. 1915) (finding contract giving lessee option to purchase property during or after installment period with deduction for lease payments conditional sale).

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[13] The term was so defined in the 1919 Conditional Sales Act. *See L.* 1919, *c.* 210. Part of that language was incorporated into the definition of "retail installment contract" under the 1948 Retail Installment Sales Act, *L.* 1948, *c.* 419, the precursor to RISA. *L.* 1960, *c.* 40. Neither Act defined "conditional sale."

Although RISA does not define the term "conditional sale," when the Legislature utilizes words that have previously been the subject of judicial construction, it is deemed to have used those words in the sense that has been ascribed to them. *State v. Thomas*, 166 *N.J.* 560, 567–68, 767 *A.*2d 459 (2001); *Quaremba v. Allan*, 67 *N.J.* 1, 14, 334 *A.*2d 321 (1975) (noting that in interpreting statute, it is assumed Legislature is conversant with its own legislation and judicial construction placed thereon). Thus, we view Perez's leases as a form of conditional sale as that term is used in RISA.

At the very least, Perez's leases were instruments "similar" to conditional sales. *N.J.S.A.* 17:16C-1(b). Indeed, it seems to us that RISA's reference to "similar instruments" was intended to sweep in cleverly drafted agreements like the one before us so that "subtle distinctions" are not allowed to defeat the manifest purposes of the law. *Vandewater*, *supra*, 219 *F.* at 629.

We are simply not satisfied that the cancellation provision so altered the fundamental nature of the transaction that it insulated Perez's leases from the protections of RISA. That conclusion is bolstered by the fact that the majority of rent-to-own contracts are intended for and in fact result in ownership, not cancellation. To exclude the many purchasers from the protective sweep of RISA by providing a cancellation option that few would exercise would be an intolerably narrow interpretation of a statute limned for consumer protective purposes.[14] As the Minnesota Supreme Court observed of rent-to-own contracts like the one before us:

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[14] Rent-A-Center's counter-intuitive characterization of the cancellation provision as an important element to consumers does not change our view. Although the convenience of cancellation may be a plus for the minority of rent-to-own consumers who need short

[Footnote continued on next page]

> [A]lthough these transactions purport to be short-term leases, they operate in substance much like ordinary installment sales. Consumers who purchase goods through rent-to-own agreements may not incur debt, but they still implicitly pay interest in return for the ability to pay for goods over time. Moreover, rent-to-own customers may not have an absolute obligation to repay a principal amount, but their situation is analogous to that of ordinary buyers on credit in that they must either forfeit possession of a good or continue paying for it.
>
> [*Miller v. Colortyme, Inc.*, 518 *N.W.*2d 544, 549 (Minn. 1994).

We agree, and hold that RISA applies to the rent-to-own contracts at issue here.

V

We turn next to Perez's contention that the 30% interest rate cap in the criminal usury statute, *N.J.S.A.* 2C:21-19(a), applies to the time price differential in RISA.

[Footnote continued from previous page]

term rentals or want to try a product, it is unlikely that the vast majority of rent-to-own consumers consider the option of consequence. According to at least one commentator, most rent-to-own consumers view cancellation as antithetical to the ownership purpose of the transaction and counterproductive insofar as cancellation is costly and goods will have to be obtained elsewhere in any event. Ronald Paul Hill, *Stalking the Poverty Consumer: A Retrospective Examination of Modern Ethical Dilemmas*, 37 *J. Bus. Eth.* 209, 215 (2002).

A.

Our point of departure is the language of the Act. The criminal usury statute prohibits the taking of "any money or other property as interest on the loan or on the forbearance of any money" in "excess of 30% per annum." *N.J.S.A.* 2C:21-19(a). As we have previously noted, the time price differential is interest. Indeed, the terms interest and time price differential are used interchangeably within RISA, *see, e.g.*, *N.J.S.A.* 17:16C-41, and we have judicially declared them to mean the same thing. *See Singer Co. v. Gardner*, 65 *N.J.* 403, 409, 323 *A.*2d 457 (1974) ("[t]he interest, and thus the time-price differential") (majority opinion); *id.* at 419 n. 1, 323 *A.*2d 457 ("[t]he effective interest or time price differential.") (Pashman, J., dissenting); *see also Stanton v. Mattson*, 175 *Neb.* 767, 123 *N.W.*2d 844, 847 (1963) (finding time price differential to be interest and usurious).

At the time of its enactment, RISA contained its own limitation on the time price differential that could be charged in connection with a retail installment sales agreement. With the exception of motor vehicles, the cap was 10%. *L.* 1960, *c.* 40, § 41. In 1981, as a result of escalating market interest rates during the prior decade, *Ackerman*, *supra*, 27 *Ariz. St. L.J.* at 105–107, New Jersey, like many other jurisdictions, enacted an omnibus bill, Senate Bill No. 3005 ("*S.* 3005"), *L.* 1981, *c.* 103, to remove interest rate caps in a passel of different lending statutes.[15] Specifically, in connection with

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[15] Among the acts addressed in *S.* 3005 were those regulating education loans, *N.J.S.A.* 17:9A-53.4; advance loans (overdraft accounts and credit cards), *N.J.S.A.* 17:9A-59.6; small business loans, *N.J.S.A.* 17:9A-59.27; loans of less than $5,000, *N.J.S.A.* 17:10-14, repealed by *L.* 1996, *c.* 157, § 5; second mortgages, *N.J.S.A.* 17:11A-44, repealed by *L.*1987, *c.* 230, § 24; loans made

[Footnote continued on next page]

RISA, S. 3005 removed the 10% limitation on time price differentials and adopted the present statutory language:

> A retail seller and a motor vehicle installment seller, under the provisions of this act, shall have authority to charge, contract for, receive or collect a time price differential as defined in this act, on any retail installment contract evidencing the sale of goods or services in an amount or amounts as agreed to by the retail seller or motor vehicle installment seller and the buyer on motor vehicles and on all other goods or services.
>
> [*N.J.S.A.* 17:16C-41 (emphasis added).]

That language authorizes parties to agree to the amount of a time price differential. According to Rent-A-Center, the statute, as written, entitles it to charge what the proverbial traffic will bear. We disagree. That might be the answer had *S.* 3005 been enacted in a vacuum and had Senate Bill No. 3101 ("*S.* 3101"), *L.* 1981, *c.* 104, to which it was tethered, not specifically addressed the same subject.

Indeed, at the same time that *S.* 3005 replaced the specific interest rate ceilings in the lending statutes with an "agreed to" provision, the Legislature adopted *S.* 3101 and amended the criminal usury statute to lower the interest rate cap from 50% to 30%. *S.* 3101 was introduced by Senators

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by savings and loan associations, *N.J.S.A.* 17:12B-160; credit union loans, *N.J.S.A.* 17:13-27, repealed by *L.* 1984, *c.* 171, § 58; retail installment loans, *N.J.S.A.* 17:16C-41; retail charge accounts, *N.J.S.A.* 17:16C-44.1; home repair loans, *N.J.S.A.* 17:16C-69; and insurance premium financing, *N.J.S.A.* 17:16D-10.

Weiss, Merlino, and Parker, the sponsors of *S.* 3005, during the same time frame in which they were moving *S.* 3005 through the legislative process. Most importantly, *S.* 3101 addressed the "agreed to" language in *S.* 3005 and stated that its cap would trump that language:

> For the purposes of this section and *notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction*, any loan or forbearance with an interest rate which exceeds 30% per annum shall not be a rate authorized or permitted by law. . . .
>
> [*N.J.S.A.* 2C:21-19 (emphasis added).]

Because RISA is, in substance, a "law of this state which permits as a maximum interest rate a rate or rates agreed to by the parties," it is subject to the 30% cap in *N.J.S.A.* 2C:21-19.

Apart from the very language of those acts, we think the circumstances surrounding their passage are powerful interpretative aids. Indeed, in *Fried v. Kervick*, 34 *N.J.* 68, 167 *A.*2d 380 (1961), we noted that statutes that are adopted on the same day should be read in *pari materia*:

> The statute being assailed . . . was adopted by the Legislature on the same day as the amendment to [the other statute]. The similarity of their subject matter, even though the latter is general in scope while the former is special, renders inescapable the conclusion that they are *in pari materia*, at least to the extent that both are reflective of the same type of legislative philosophy.

Id. at 70–71, 167 *A.*2d 380; *accord State v. Tillem*, 127 *N.J. Super.* 421, 427, 317 *A.*2d 738 (App. Div. 1974) (observing the particular importance of considering together statutory

provisions "passed at the same time to effectuate a given result or to overcome a certain evil"); Norman J. Singer, 2A *Sutherland Statutes and Statutory Construction* § 51:3 (6th ed. 2000) ("[T]he rule that statutes *in pari materia* should be construed together has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the Legislature, especially if they were passed or approved or to take effect on the same day.") (citations omitted).

Applying those principles to *S.* 3005 and *S.* 3101, it seems clear to us from the identity of language and sponsorship and the lockstep enactment of those statutes that the Legislature intended, on the one hand, to free parties to retail installment sales contracts to agree to interest rates reflective of market conditions and, on the other, to protect consumers from overreaching merchants by imposing an absolute cap of 30% within which the parties to a RISA contract could negotiate.

If there was any doubt about that conclusion, Governor Byrne laid it to rest in his statement upon signing the bills. He recognized concerns over the elimination of interest rate ceilings in *S.* 3005:

> Some believe that this bill will ruin many consumers. I disagree. I expect that our banks and other lenders will behave responsibly; competitive pressures should prevent lenders from setting artificially high interest rates. Similarly, I believe that most New Jersey consumers will avoid excessive indebtedness.
>
> [Statement of Governor Brendan Byrne in Signing *S.* 3005 and *S.* 3101 (March 31, 1981).]

Significantly, he also declared that those concerns by opponents of *S.* 3005 were ameliorated by the lowering of the criminal usury rate to 30%. *See id.*

In that connection, it is well-established that "the governor's action in approving or vetoing a bill constitutes a part of the legislative process, and the action of the governor upon a bill may be considered in determining legislative intent." *Sutherland Statutory Construction*, *supra*, § 48.05, *cited approvingly in State v. Sutton*, 132 *N.J.* 471, 483, 625 *A.*2d 1132 (1993); *Fields v. Hoffman*, 105 *N.J.* 262, 270, 520 *A.*2d 751 (1987). We take from the legislative history, including the governor's message, a legislative intent to create a seamless scheme pursuant to which consumers and sellers are accorded flexibility to negotiate interest rates to reflect market conditions subject to the 30% safety cap.

B.

Rent-A-Center's arguments that the criminal usury statute cannot have been intended to apply to RISA do not withstand scrutiny. First, there is nothing in the usury statute to suggest that its specific reference to the "agreed to" language was intended to exclude RISA. Second, as we have noted, and despite Rent-A-Center's contrary argument, the time price differential is, in fact, "interest," which is the operative term in the usury statute. Thus, there is nothing on the face of the statute that would be violated by its application here.

Rent-A-Center's contention that the time price differential is an historical exception to the usury statute, militating against reading it as subject to the usury cap, is equally unavailing. As we have observed, when, in the mid-twentieth century, states across the country began imposing interest rate caps on retail installment sales, that historical exception lost its currency. In fact, the RISA interest rates became a proxy for the usury laws. In other words, the idea that a loan made in connection with the time sale of goods should be unregulated fell out of favor long before this case, and pro-

vides no basis for us to decline application of the 30% cap to RISA. Moreover, even if the historical treatment of the time price differential still had currency in 1981 when *S.* 3101 and *S.* 3005 were enacted (which it did not), it goes without saying that the Legislature was free to abrogate that common-law notion if it chose to. We view the enactment of RISA in 1960 along with the amendments to RISA and the usury statute in 1981 as such an abrogation.

Rent-A-Center next argues that we should interpret some recent legislative initiatives as supporting its view. In particular, it references several unsuccessful legislative attempts, since 1990, to amend RISA to expressly limit the permissible time price differential to the 30% rate permitted under the criminal usury statute. *See, e.g., Assemb. B.* 195, 210th Leg. (N.J. 2002); *Assemb. B.* 1699, 210th Leg. (N.J. 2002); *Assemb. B.* 3399, 209th Leg. (N.J. 2001); *S.B.* 1491, 208th Leg. (N.J. 1998); *Assemb. B.* 294, 208th Leg. (N.J. 1998); *Assemb. B.* 682, 207th Leg. (N.J. 1996); *Assemb. B.* 4780, 204th Leg. (N.J. 1990). Rent-A-Center contends that those initiatives show that the usury cap is not presently applicable to RISA. But unsuccessful attempts to amend a statute are of little use in determining the intent of the Legislature when enacting the original law. *Garden State Farms, Inc. v. Bay*, 77 *N.J.* 439, 453, 390 *A.*2d 1177 (1978) (quoting C. Sands, 2A *Sutherland Statutory Construction* § 48.18 (4th ed. 1973)); *Fraser v. Robin Dee Day Camp*, 44 *N.J.* 480, 486, 210 *A.*2d 208 (1965).

Additionally, in two of the cited unsuccessful legislative attempts, the sponsor's statements regarding the failed bills specifically contradict Rent-A-Center's interpretation. They indicate that the intent of the proposed amendments was to "make[ ] explicit" what the sponsor already believed to be the case, i.e., that the time price differentials permitted under RISA were subject to the provisions of the criminal usury

law. *Assemb. B.* 195, 210th Leg. (N.J. 2002); *Assemb. B.* 3399, 209th Leg. (N.J. 2001).

Finally, Rent-A-Center claims that our case law embraces its view that the usury cap cannot be imported into RISA. In support, it cites *Sliger v. R.H. Macy & Co., Inc.*, 59 *N.J.* 465, 468–69, 283 *A.*2d 904 (1971), *Saul v. Midlantic Nat'l Bank/South*, 240 *N.J. Super.* 62, 572 *A.*2d 650 (App. Div. 1990), and *Steffenauer, supra*, 87 *N.J. Super.* 506, 210 *A.*2d 88. Again, we disagree. Those opinions are no impediment to our holding here. Neither *Sliger*, *Steffenauer*, nor *Saul* have any relevance to the issue before us. Rather, those cases analyzed installment sales relative to the civil usury statute, which contains language that is entirely distinct from *N.J.S.A.* 2C:21-19. Unlike the criminal usury statute that sweeps in all cases where rates are "agreed to," the civil usury statute specifically carves out from its coverage other statutes that establish a different interest rate.[16] Further, *Saul*, which was decided after *S.* 3101 and *S.* 3005 were enacted, actually holds that the criminal usury statute is applicable to retail installment sales. *Saul, supra*, 240 *N.J. Super.* at 66 n. 1, 572 *A.*2d 650.

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16 The civil usury statute provides:

> *Except as herein and otherwise provided by law*, no person shall, upon contract, take, directly or indirectly for loan of any money, wares, merchandise, goods and chattels, above the value of $6.00 for the forbearance of $100.00 for a year, or when there is a written contract specifying a rate of interest, no person shall take above the value of $16.00 for the forbearance of $100.00 for a year.
>
> [*N.J.S.A.* 31:1-1(a) (emphasis added).]

We therefore reject Rent-A-Center's arguments to the contrary and hold that the language used and the circumstances surrounding the enactment of *S.* 3101 and *S.* 3005 clearly establish the relationship between the statutes. By their passage, the Legislature eliminated the specific 10% cap in RISA, which was far below market rates at the time, to allow the free play of supply and demand to inform negotiated rates. At the same time, it imposed an absolute ceiling of 30% on RISA that was sufficiently above the upper limits of the free market to allow flexibility and yet protect consumers from themselves and rapacious sellers. In sum, we interpret RISA as incorporating the 30% cap. It follows that Rent-A-Center's rent-to-own contracts, which are governed by RISA, are subject to the cap. Therefore, the counts of Perez's complaint that allege a violation of those statutes should be reinstated.

VI

We turn finally to Perez's claim that the Appellate Division erred in failing to separately address her CFA counts.

A.

The CFA was passed "to protect consumers 'by eliminating sharp practices and dealings in the marketing of merchandise and real estate.'" *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 *N.J.* 255, 263, 696 *A.*2d 546 (1997) (quoting *Channel Cos. v. Britton*, 167 *N.J. Super.* 417, 418, 400 *A.*2d 1221 (App. Div. 1979)). It prohibits

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any

> merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby....
>
> [*N.J.S.A.* 56:8-2.]

"Merchandise" includes "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." *N.J.S.A.* 56:8-1(c). "Sale" is defined as "any sale, rental or distribution, offer for sale, rental or distribution or attempt directly or indirectly to sell, rent or distribute." *N.J.S.A.* 56:8-1(e).

Rent-A-Center concedes that the Act covers the rent-to-own transactions involved here. However, it argues, citing *Lemelledo, supra*, 150 *N.J.* 255, 696 *A.*2d 546, that if RISA applies, then the CFA cannot apply because the transaction was "subject to comprehensive regulation." Again, we disagree.

The CFA itself instructs that it should be applied in conjunction with other statutes or common law, *N.J.S.A.* 56:8-2.13 provides:

> The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

Lemelledo addresses that point:

> The language of the CFA evinces a clear legislative intent that its provisions be applied

> broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud.
>
> . . . .
>
> . . . We are loathe to undermine the CFA's enforcement structure, which specifically contemplates cumulative remedies and private attorneys general, by carving out exemptions for each allegedly fraudulent practice that may concomitantly be regulated by another source of law. The presumption that the CFA applies to covered practices, even in the face of other existing sources of regulation, preserves the Legislature's determination to effect a broad delegation of enforcement authority to combat consumer fraud.
>
> In order to overcome the presumption that the CFA applies to a covered activity, a court must be satisfied . . . that a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes.
>
> We stress that the conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility.
>
> [*Lemelledo*, *supra*, 150 *N.J.* at 264, 270, 696 *A.*2d 546.]

Here, Rent-A-Center has not suggested, even obliquely, any conflict between the CFA and RISA, let alone one of a

direct and unavoidable nature, nor do we perceive one. Accordingly, the acts must be construed in concert with each other and Rent-A-Center's contention that only one can be applicable at a time must be rejected.

B.

The remaining question is whether the Appellate Division erred in omitting consideration of Perez's CFA count. Perez based her CFA claim on the notion that Rent-A-Center's interest charges were unconscionable and in violation of the CFA because they exceeded the 30% interest cap in RISA. Therefore, when the trial judge ruled against her on the applicability of RISA and the cap, he automatically dismissed the CFA claim as well. That Perez understood the intertwined nature of her claims is evidenced by the fact that she did *not* challenge the dismissal of her CFA claim on appeal. Accordingly, when the Appellate Division rejected her RISA and usury claims, there was no warrant for it to separately consider the CFA claim which was not before it and which had no independent factual or legal basis.

Because we have parted company from the Appellate Division on the fundamental issue of the applicability of RISA and the usury cap, to the extent that Perez's CFA claim is linked to them, it must be reinstated as well.

VII

The judgment of the Appellate Division is reversed. The matter is remanded to the trial judge for reinstatement of Perez's complaint and for such further proceedings as are warranted.

Justice RIVERA-SOTO, concurring in part and dissenting in part.

To the extent the majority "hold[s] that [defendant] Rent-A-Center[, Inc.] is not collaterally estopped from defending against the [Retail Installment Sales Act ("RISA"),

N.J.S.A. 17:16C-1 to -61] claim [plaintiff Hilda] Perez has leveled against it[,]" *ante*, 186 *N.J.* at 201–02, 892 *A.*2d at 1263 (2006), I concur.

However, to the extent the majority concludes that "RISA applies to the rent-to-own contracts at issue here[,]" *ante*, 186 *N.J.* at 212, 892 *A.*2d at 1270 (2006); embraces plaintiff's contention that "the 30% interest rate cap in the criminal usury statute, *N.J.S.A.* 2C:21-19(a), applies to the time price differential in RISA[,]" *ante*, 186 *N.J.* at 212, 892 *A.*2d at 1270 (2006); and holds that plaintiff's individual and class claims under the Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -135, must be reinstated, *ante*, 186 *N.J.* at 218–21, 892 *A.*2d at 1273–75 (2006), I respectfully dissent for substantially the reasons expressed in Judge Petrella's thoughtful and reasoned opinion below. *Perez v. Rent-A-Center, Inc.*, 375 *N.J. Super.* 63, 866 *A.*2d 1000 (App. Div. 2005). I add only the following.

Many may consider the rent-to-own industry abhorrent. However, setting aside that particularly noxious version of *noblesse oblige*, the fact remains that merchants that offer goods on a rent-to-own basis nevertheless satisfy an important need. The Federal Trade Commission has acknowledged that

> [r]ent-to-own transactions provide immediate access to household goods for a relatively low weekly or monthly payment, typically without any down payment or credit check. Consumers enter into a self-renewing weekly or monthly lease for the rented merchandise, and are under no obligation to continue payments beyond the current weekly or monthly period. . . . These terms are attractive to many consumers who cannot afford a cash purchase, may be unable to qualify for credit, and are unwilling or unable to wait until they can save

> for a purchase. Some consumers also may value the flexibility offered by the transaction, which allows return of the merchandise at any time without obligation for further payments or negative impact on the customer's credit rating. Other consumers may rent merchandise to fill a temporary need or to try a product before buying it.
>
> [Federal Trade Commission, Bureau of Economics Staff Report: Survey of Rent-to-Own Customers ES-3 (April 2000).]

Moreover, the New Jersey Legislature has similarly recognized the value and contributions of this industry in a most eloquent way: by simply leaving it alone. As the Appellate Division noted in its Appendix, "[v]irtually every other state in the nation, as well as the District of Columbia, has adopted a statute explicitly regulating rent-to-own contracts as a distinct transactional form. The *only* exceptions are *New Jersey*, North Carolina and Wisconsin." *Perez v. Rent-A-Center, Inc.*, *supra*, 375 *N.J. Super.* at 89, 866 *A.*2d 1000 (emphasis supplied).

If there is a need to regulate the rent-to-own industry—a need certainly not demonstrated in this record—then the source of that regulation should be legislative or executive action, and not a cobbled-together judicial cure for a perceived but unsubstantiated ill. Because a rent-to-own contract is not a "retail installment contract" under RISA, the provisions of RISA simply are inapplicable by their own terms. Further, because the criminal usury statute is not intended to apply to a time-price differential, that is, the difference between the cash price of an item and the cost to purchase that same item on credit, it similarly does not apply to rent-to-own contracts. Finally, because plaintiff's individual and class Consumer Fraud Act claims are based on her RISA and criminal usury claims, those too should fail.

For the foregoing reasons, I respectfully dissent.

For reversal and remandment—Chief Justice PORITZ and Justices LONG, LaVECCHIA, ZAZZALI, ALBIN and WALLACE—6.

For concurrence in part; dissent in part—Justice RIVERA-SOTO—1.

APPENDIX B

SUPREME COURT OF NEW JERSEY
M-1339/1340
September Term 2005
57,572

HILDA PEREZ, ON BEHALF
HERSELF AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

ORDER

RENT-A-CENTER, INC.,

Defendant-Movant.

[Filed Jun. 23, 2006]

This matter having been duly presented to the Court, IT IS ORDERED that the motion for reconsideration (M-1339) is denied; and it is further

ORDERED that the motion for clarification (M-1340) is granted, limited to the following: The judgment of the Court is prospective. It applies to plaintiff and, if the trial court certifies this matter as a class action as part of the proceedings it conducts pursuant to the Court's remand, to the members of the class.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 21st day of June 2006.

/s/
CLERK OF THE SUPREME COURT

[Stamp Omitted]

APPENDIX C

SUPREME COURT OF NEW JERSEY
M-1339/1340
September Term 2005
57,572

HILDA PEREZ, ON BEHALF
HERSELF AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v. CORRECTED ORDER

RENT-A-CENTER, INC.,

Defendant-Movant. [Filed July 10, 2006]

This matter having been duly presented to the Court,

IT IS ORDERED that the motion for clarification (M-1339) is denied; and it is further

ORDERED that the motion for clarification (M-1340) is granted, limited to the following: The judgment of the Court is prospective, except that it applies to plaintiff and if the trial court certifies this matter as a class action as part of the proceedings it conducts pursuant to the Court's remand, to the members of the class.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 21st day of June 2006.

/s/
CLERK OF THE SUPREME COURT

[Stamp Omitted]

APPENDIX D

Hilda PEREZ, on Behalf of Herself and All Others Similarly Situated, Plaintiff-Appellant,

v.

RENT-A-CENTER, INC., Defendant-Respondent.

Superior Court of New Jersey, Appellate Division.

Argued Dec. 13, 2004.

Decided Feb. 4, 2005.

Seth R. Lesser, New York, NY, argued the cause for appellant (Locks Law Firm; Williams Cuker & Berezofsky; and William Riback, attorneys; Mr. Lesser, Mark Cuker, Philadelphia, PA, and Mr. Riback, on the brief).

Ezra D. Rosenberg, Princeton, argued the cause for respondent (Dechert, attorneys; Mr. Rosenberg, David A. Kotler, and Thomas Kane, on the brief).

National Consumer Law Center, attorneys for amicus curiae Consumer Law Center, Consumer Federation of America, New Jersey Public Interest Research Group Citizen Lobby and U.S. Public Interest Research Group (Sanford Wittels & Heisler and National Consumer Law Center, attorneys; Steven L. Wittels, Armonk, NY, Dale Graddon, Washington, DC, and Stuart T. Rossman, Boston, MA, of counsel and on the brief).

Loughlin & Latimer, attorneys for amicus curiae Consumers League of New Jersey (Michaelene Loughlin, Hackensack, on the brief).

Before Judges PETRELLA, LINTNER and PARKER.

The opinion of the court was delivered by

PETRELLA, P.J.A.D.

Plaintiff Hilda Perez appeals from a summary judgment dismissing her complaint[1] alleging that her "rent-to-own" contracts with defendant Rent-A-Center, Inc. (defendant or Rent-A-Center) violated the Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -135, and the Retail Installment Sales Act (RISA), *N.J.S.A.* 17:16C-1 to -61, because the time-price differential exceeded the 30% per annum interest rate permitted under the criminal usury statute, *N.J.S.A.* 2C:21-19. Defendant counterclaimed for return of the items Perez had rented from it because she had ceased making rental payments. We affirm the grant of summary judgment and conclude that neither the Rental Sales Installment Contract (RISA) nor the criminal usury statute is applicable to the sales transactions at issue.

On appeal, Perez argues that: (1) Rent-A-Center's contracts in New Jersey are governed by RISA, and it is collaterally estopped from arguing to the contrary; (2) the judge erred in holding that RISA did not apply; (3) RISA does not permit the charging of a time price differential/interest greater than 30% per annum; (4) the *Saul*[2] and *Steffenauer*[3]

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[1] The complaint had sought class action certification, but that issue was not decided before the complaint's dismissal.

[2] *Saul v. Midlantic National Bank/South*, 240 *N.J. Super.* 62, 572 *A.*2d 650 (App. Div. 1990).

decisions referred to by the motion judge are not applicable to whether RISA contracts are subject to a 30% interest cap; and (5) Rent-A-Center's reliance on common law doctrines of "Loan or Forbearance" of money or the "Time Price Doctrine" is inconsistent with the legislation.

On November 25, 2002, Rent-A-Center filed a small claims complaint against Perez in Camden County seeking money damages arising from Perez's refusal to pay for or return a big-screen television and computer that she had rented from it. The record does not reflect the resolution of the small claims action. Perez contends she answered the small claims complaint with a "class action counterclaim," and moved to transfer the case to the Law Division, but while her motion to transfer was pending, Rent-A-Center dismissed its complaint.

Conversely, Rent-A-Center contends that the small claims action was transferred to the Law Division and consolidated with remaining similar claims in *Utley v. Rent-A-Center, Inc.*, CAM-L-2432-02, which was ultimately removed to the United States Bankruptcy Court for the District of New Jersey. Perez denies that the case was consolidated with *Utley*.

Neither party substantiates their version of the procedural history except for providing a copy of the small claims complaint. For purposes of this appeal it appears that: (1) the small claims action is either no longer pending or was consolidated with the Law Division action presently under ap-

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[Footnote continued from previous page]

[3] *Steffenauer v. Mytelka & Rose, Inc.*, 87 *N.J. Super.* 506, 210 *A.*2d 88 (Ch. Div. 1965), *aff'd* 46 *N.J.* 299, 216 *A.*2d 585 (1966).

peal; and (2) whether a consolidation ever occurred between the case under review and Utley is now immaterial.

On March 21, 2003, Perez filed an "amended"[4] complaint in the Law Division, alleging that her "rent-to-own" contracts with Rent-A-Center violated the Consumer Fraud Act and RISA because they imposed a time-price differential allegedly in excess of the 30% per annum interest rate permitted under the criminal usury statute. Rent-A-Center counterclaimed for breach of contract and conversion. It sought compensation for property Perez allegedly rented, including furniture, a washer and dryer, a computer, a big-screen television and cabinet, and a DVD player, with a retail value aggregating about $9,300, on which she stopped making payments after paying $8,156.72, and which she refused to return. Perez answered the counterclaims, denying liability and claiming entitlement to the rented items on the ground that Rent-A-Center was legally prohibited from enforcing the rent-to-own contracts.

In September 2004, Perez moved for partial summary judgment and Rent-A-Center cross-moved for summary judgment. In a November 21, 2004 oral opinion, the judge held that rent-to-own transactions are not covered by either RISA or the criminal usury statute and granted Rent-A-Center's cross-motion. A January 14, 2004 order dismissed Perez's complaint.

A consent order dated February 12, 2004 was then entered in Rent-A-Center's favor on its remaining counterclaims against Perez, and she was directed to return all merchandise rented from Rent-A-Center. Enforcement of the order was stayed, however, until thirty days after resolution of this appeal.

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[4] The original complaint is not in the appellate record.

Rent-A-Center, a Delaware corporation with corporate offices in Texas, is apparently the largest company in the rent-to-own industry. As of December 2002, it owned forty Rent-A-Center stores and had eight franchised stores in New Jersey.

The Federal Trade Commission (FTC), in an April 2000 study, described the rent-to-own industry as:

> The rent-to-own industry (also known as the rental-purchase industry) consists of dealers that rent furniture, appliances, home electronics, and jewelry to consumers. Consumers enter into a self-renewing weekly or monthly lease for the rented merchandise, and are under no obligation to continue payments beyond the current weekly or monthly period. At the end of each period, the consumer can continue to rent by paying for an additional period, or can return the merchandise. The lease provides the option to purchase the goods, either by continuing to pay rent for a specified period of time, usually 12 to 24 months, or by early payment of some specified proportion, usually 50 to 60 percent, of the remaining lease payments.
>
> Rent-to-own transactions offer immediate access to household goods for a relatively low weekly or monthly payment, typically without any down payment or credit check. These terms are attractive to many customers who cannot afford a cash purchase, may be unable to qualify for credit, and are unwilling or unable to wait until they can save for a purchase. Some consumers also may value the flexibility offered by the transaction, which allows return of the merchandise at any time without

> obligation for further payments or negative impact on the customer's credit rating. Other consumers may rent merchandise to fill a temporary need or to try a product before buying it. (footnotes omitted).

The FTC found that rent-to-own customers were distinct in many ways from non-rent-to-own customers. Rent-to-own customers were more likely to be poorer and less educated. FTC statistics were that 67% of rent-to-own customers intended to purchase the merchandise when they began the rent-to-own transaction, and 70% of rent-to-own merchandise was ultimately purchased by the customer.

A 1996 Price Waterhouse, LLC survey for Rent-A-Center of its customers in New Jersey confirmed that Rent-A-Center's customers used its services because they could not afford to purchase the items at a traditional retail store. Most customers understood, however, that ultimately the total payments to purchase an item would be more than they would pay at a traditional retail store.

Two of Rent-A-Center's economic experts in the present litigation, Patrick Gaughan, Ph.D., and Henry L. Fuentes, C.P.A., conducted an analysis of Rent-A-Center's product offerings. They found that 64% of rental units were ultimately acquired by defendant's customers. An average of eighteen months was generally required to obtain ownership of new merchandise.

Perez entered into five rent-to-own contracts with Rent-A-Center through its store in Pennsauken. She indicated that she intended to purchase the items she rented. She testified at depositions that she might not have fully understood all of the contract terms. In a March 3, 2001 contract Perez rented several pieces of furniture. In an April 23, 2001 contract she rented a washer and dryer. In an August 3, 2001 contract Perez rented a DVD player and television. In a November 17, 2001 contract she rented a computer. In the fifth contract,

dated May 6, 2002, she rented a big-screen television and cabinet.[5]

The following table summarizes Perez's rent-to-own contracts with defendant.

follows:

Agreement Number	Date	Product	Cash Price	Weekly Rate*	Weeks to Ownership	Total Rent-to-Own Cost**	Amount Perez Paid***
34413883	03/03/01	Furniture	$1,951.43	$38.99	91.4	$3,902.76	$2,573.34
34414122	04/23/01	Washer/dryer	987.47	21.99	95.3	1,984.90	1,418.71
34414671	08/03/01	DVD/TV	1,160.99	22.99	92.0	2,321.99	1,264.39
34415583	11/17/01	Computer	2,235.48	42.99	95.0	4,470.96	1,934.49
34416433	05/06/02	big-screen TV & cabinet	2,966.35	45.99	120.0	5,932.71	965.79
Totals			$9,301.72	$172.95		$28,613.32	$8,156.72

*Weekly Rate[6]

**Total Rent-To-Own Cost[7]

***Amount Perez Paid[8]

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[5] Plaintiff's attack on rent-to-buy arrangements might eliminate the availability of that option to persons ineligible for loans or who cannot afford to purchase a product outright or qualify under a retail sales installment contract.

[6] The "weekly rate" shown in the table was derived from the rental contracts. The "weekly rate" is the weekly rental rate without tax or other fees (such as an "optional liability waiver fee," which the record reflects Perez often paid).

[7] The "total rent-to-own cost" shown in the table was derived from the rental contracts. The contracts assume all payments are made on a weekly basis, and include payment of the contract's "fair market value" cost of the product at the end of the rental period; the figure does not include tax.

[8] The "amount Perez paid" was derived from the rental summaries provided in the record (the amount indicated under the heading Rent Paid). There is no rental summary for the furniture rental.

[Footnote continued on next page]

Under the contracts, Perez promised to maintain the items in good working order during the rental terms, normal wear and tear excepted. She was liable for excess damages and loss or destruction of the property from any cause, including, but not limited to, theft or vandalism. Perez could terminate each one of her rent-to-own contracts at her option at the end of any rental term, without penalty. To terminate the contract, the renter had to arrange for the return of the property and make all rental payments due through the date of return. Alternatively, the renter could continue the rent-to-own contract by paying, in advance, a rental installment for another weekly, semi-monthly, or monthly rental term.

The contracts explicitly stated that they were "rental agreements only" and defined the means by which a renter could purchase the rented product. The agreements stated:

> THIS IS A RENTAL AGREEMENT ONLY
>
> This is a rental agreement only. You will not acquire any equity in the property by making rental payments. You have not agreed to purchase this property, and will not acquire any ownership rights in it unless you have, at your option, paid the total of rental payments plus the option payment necessary to acquire ownership.

The rental agreements further stated (using the example of the big-screen television rental agreement):

[Footnote continued from previous page]

Therefore, the "amount Perez paid" for the furniture rental was derived by adding the rent payments (exclusive of tax and other fees) identified in the rental summary.

4. OWNERSHIP: We own the property you are renting. You will not acquire any ownership rights in the property unless you have, at your option, paid the total of payments plus the purchase option price necessary to acquire ownership as set forth below, or exercise the early purchase option described below. If you want to purchase this or similar property now, you may be able to get cash or credit terms from other sources which will result in a lower total cost than the rental payments, plus the purchase option price provided for below. OPTION TO PURCHASE: If you renew this Agreement for 120.0 successive weeks, you will pay a total of $5,518.80 or if you renew this Agreement for 55.6 successive semi-months, you will pay a total of $5,479.38 or if you renew this Agreement for 27.8 successive months, you will pay a total of $5,114.08 and will have the option to purchase the property for its then fair market value. For purpose of this option, this price will not exceed $413.91. Thus, in order to acquire ownership of this item, you must pay the total amount of $5,932.71 if you pay weekly rental payments, or $5,893.29 if you pay semi-monthly rental payments, or $5,527.99 if you pay monthly rental payments. Figures do not include tax.

5. OUR CASH PRICE FOR THIS PROPERTY is $2,966.35. This price may be different from the MSRP or other available retail prices.

6. EARLY PURCHASE OPTION: If you wish to purchase the rental property, you may

> do so at any time by the payment of 50% of the remaining rental payments calculated at that time, plus 50% of the option to purchase amount described above.

Rent-A-Center employed various experts. Gaughan, an economist, and Fuentes, a CPA, conducted an economic analysis of Rent-A-Center's product offerings and were of the opinion that Rent-A-Center was not engaged in the outright sale of products. They concluded that the "product" offered by Rent-A-Center was actually a package of products and services that included product delivery, pick-up, and maintenance.

Gaughan and Fuentes were also of the view that the costs Rent-A-Center incurred in providing its package of products and services were substantial, including, but not limited to, delivery and pick-up costs, maintenance and refurbishment costs, and costs for write-offs of uncollectable or "returned-unrentable" merchandise. They stated that these costs differed from those incurred by sellers of comparable products.

Finally, Gaughan and Fuentes concluded that "time-price differentials" or "implied interest rates" could not be calculated for Rent-A-Center's rent-to-own transactions. Any such calculations would fail to consider the unique nature of the rent-to-own transactions, the package of products and services being marketed, and the cost of providing that package.

A. Charlene Sullivan, an Associate Professor of Management at Purdue University's Graduate School of Management, essentially agreed with Gaughan and Fuentes. She opined that: Rent-A-Center's transactions are not sales transactions or installment sales transactions; the majority of Rent-A-Center's transactions do not result in ownership; there is no typical outcome in one of Rent-A-Center's transactions; its cost structure is dramatically different from that

of a business selling household goods; and there is no time-price differential in its transactions.

James J. White, a professor of law at the University of Michigan Law School, and Charles W. Mooney, Jr., a professor of law at the University of Pennsylvania Law School, submitted legal opinions on behalf of Rent-A-Center to the effect that rent-to-own contracts are not retail installment contracts as defined by RISA. These opinions, however, would be inadmissible at a trial based upon the general rule that experts may not render opinions on questions of law. *Boddy v. Cigna Prop. & Cas. Cos.*, 334 *N.J. Super.* 649, 659, 760 *A.*2d 823 (App. Div. 2000); *Healy v. Fairleigh Dickinson Univ.*, 287 *N.J. Super.* 407, 413, 671 *A.*2d 182 (App. Div.), *certif. denied*, 145 *N.J.* 372, 678 *A.*2d 713, *cert. denied*, 519 *U.S.* 1007, 117 *S. Ct.* 510, 136 *L. Ed.* 2d 399 (1996). Thus, we may disregard them. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 523, 666 *A.*2d 146 (1995) (on summary judgment court may only consider "competent" evidential materials presented).

Perez employed two experts. James Hunt, an actuary, calculated interest rates for several of Perez's rental agreements with Rent-A-Center, assuming she made all payments contemplated by the agreements. He opined that: (1) for the washer and dryer, the annual interest rate was 79.9%; and (2) for the furniture, the annual interest rate was 82.7%. The annual interest rate for the DVD player fell somewhere between 79.9% and 82.7%. Hunt was of the opinion that interest rate calculations were valid even if the items were rented for only one week, as long as there remained the option to buy.

Perez's other expert, Dr. Jane Kolodinsky, an economics professor at the University of Vermont, calculated time-price differentials charged with respect to five different product categories sold at Rent-A-Center's stores in New Jersey. She opined:

(1) *For DVD players*, the average time-price differential for weekly payments was 143.6%; for monthly payments, it was 110.5%.

(2) *For televisions*, the average time-price differential for weekly payments was 96.5%; for monthly payments, it was 79.4%.

(3) *For refrigerators*, the average time-price differential for weekly payments was 99.5%; for monthly payments, it was 81%.

(4) *For dryers*, the average time-price differential for weekly payments was 93.7%; for monthly payments, it was 76.4%.

(5) *For washers*, the average time-price differential for weekly payments was 100.9%; for monthly payments, it was 81.2%.

Kolodinsky further opined that, across five product categories, sixteen locations, and almost 400 time-price differential calculations (weekly and monthly), the average time-price differential for weekly payments at defendant's New Jersey stores was 106.78%; for monthly payments it was 85.7%. Hunt concurred in Kolodinsky's calculations.

Rent-A-Center's experts, Gaughan and Fuentes, responded that the calculations made by Perez's experts were flawed and invalid because her experts had worked under the mistaken assumption that Rent-A-Center's rental agreements were financed sales and did not take into consideration the unique nature of the rent-to-own business.

I.

The initial question before us is whether the rent-to-own contracts between Perez and Rent-A-Center are "retail in-

stallment contracts" under RISA.[9] The motion judge held that they were not. Our standard of review is de novo. *Manalapan Realty, L.P. v. Tp. Comm. of Manalapan*, 140 *N.J.* 366, 378, 658 *A.* 2d 1230 (1995).

Collateral Estoppel

Before addressing whether the parties' rent-to-own contracts are governed by RISA, we turn to Perez's contention that Rent-A-Center is barred by the doctrine of collateral estoppel from arguing that its contracts are not governed by RISA based on the resolution of an earlier case in which Rent-A-Center was a defendant, *Robinson v. Thorn Americans, Inc.*, CAM-L-3697-94.

Robinson was a class action in which the plaintiffs alleged, among other things, that Rent-A-Center's contracts violated RISA. In April 1996, the Law Division certified a class consisting of "all residents of New Jersey who are or have been parties to contracts to rent-to-own merchandise from Defendant[s] since April 19, 1988."

Rent-A-Center filed two motions for summary judgment, contending that RISA did not apply to its rent-to-own contracts. The Law Division denied the motions, concluding that the contracts were governed by RISA. Plaintiffs moved for partial summary judgment. On January 24, 1997, the Law Division ruled that in several respects Rent-A-Center's contracts and business practices violated RISA and the Consumer Fraud Act and entered partial summary judgment in plaintiffs' favor. The entire case was not resolved because the

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[9] Amicus curiae, the National Consumer Law Center, the Consumer Federation of America, NJPIRG Citizen Lobby, U.S. PIRG, and Consumers League of New Jersey, argue in support of Perez's position.

judge made no findings as to certain alleged violations of RISA, and denied summary judgment on a count in the complaint alleging violation of usury laws. Rent-A-Center's motion for leave to appeal was denied.

The record is unclear as to what happened to plaintiffs' remaining claims in *Robinson*. However, the record reflects that in September 1997 partial summary judgment was granted in plaintiffs' favor on the issue of damages with respect to the Consumer Fraud Act claim and that in January 1998 the Law Division entered judgment in plaintiffs' favor. Execution of the judgment was stayed pending Rent-A-Center's appeal. The case, however, settled before argument and we dismissed the appeal without prejudice to reinstatement if the settlement was not consummated. The settlement was consummated under an agreement by which Rent-A-Center denied liability and plaintiffs agreed that the settlement could not be construed as an admission of liability. Rent-A-Center agreed to a cash settlement of $48,450,000 and to amend its rental agreements in New Jersey. In exchange for the compromises made by Rent-A-Center, plaintiffs agreed to the dismissal of their claims. On October 13, 1999, after a hearing under R. 4:32-4, judgment was entered in accordance with the settlement and all claims against Rent-A-Center were dismissed with prejudice and without costs.

The facts presented in this case do not warrant application of collateral estoppel. The common issue between *Robinson* and the present case is a novel issue of law and public importance that has not been addressed by the highest court of this State. Moreover, as a trial court decision *Robinson* is not binding on other courts. *See Restatement (Second) of Judgments*, §§ 28 and 29 (1982), and comment I to § 29.

There are five elements to collateral estoppel: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) there was a full and fair opportunity to

litigate the issue in the prior proceeding; (3) a final judgment on the merits was issued in the prior proceeding; (4) determination of the issue was essential to the prior judgment; and (5) the party against whom issue preclusion is sought was a party to, or in privity with, a party to the prior proceeding. *Fama v. Yi*, 359 *N.J. Super.* 353, 359, 820 *A.*2d 65 (App. Div.), *certif. denied*, 178 *N.J.* 29, 834 *A.*2d 403 (2003); *Pace v. Kuchinsky*, 347 *N.J. Super.* 202, 215, 789 *A.*2d 162 (App. Div. 2002); *Barker v. Brinegar*, 346 *N.J. Super.* 558, 565–567, 788 *A.*2d 834 (App. Div. 2002).

Collateral estoppel has its roots in equity. Therefore, even if all five elements are met, collateral estoppel may still be denied if applying the doctrine would be unfair. *Fama*, *supra* (359 *N.J. Super.* at 359, 820 *A.*2d 65); *Pace*, *supra* (347 *N.J. Super.* at 215–216, 789 *A.*2d 162); *Barker*, *supra* (346 *N.J. Super.* at 566, 788 *A.*2d 834).

Here, the third element of the collateral estoppel doctrine has not been met. The final judgment in *Robinson* was not on the merits, but was entered pursuant to a settlement agreement and resulted in the dismissal of plaintiffs' claims with prejudice, not a judgment in favor of plaintiffs.[10]

The procedural history of *Robinson* distinguishes it from the cases upon which Perez relies for application of collateral estoppel. In the cases upon which she relies, the parties settled after the appeal was filed and asked the appellate courts

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[10] Entry of the judgment based upon the court-approved settlement agreement had the effect of superceding the initial "final judgment" on the merits. Whether or not the second final judgment explicitly stated this effect is irrelevant. The parties in settling the matter, and the court in approving the settlement, clearly intended to supercede the initial final judgment, and the court effected that result through entry of the second final judgment.

to vacate the judgments. The appellate courts demurred. *See, e.g., U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 *U.S.* 18, 115 *S. Ct.* 386, 130 *L. Ed.* 2d 233 (1994); *In re Mem'l Hosp. of Iowa County, Inc.*, 862 *F.*2d 1299 (7th Cir. 1988); *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 *F.*2d 720 (9th Cir. 1982). The United States Supreme Court has held that, where cases have been settled while on appeal, it is generally, although not always, inappropriate for federal appellate courts to vacate the lower courts' earlier judgments. *U.S. Bancorp*, *supra* (513 *U.S.* at 29, 115 *S. Ct.* at 393, 130 *L. Ed.* 2d at 244). The Court noted, however, that an appellate court could choose to remand the case to the trial court for consideration of the vacatur request. *Ibid.*

This case is more akin to *Aetna Cas. & Sur. Co. v. Ply Gem Indus., Inc.*, 313 *N.J. Super.* 94, 712 *A.*2d 717 (Law Div. 1997), *rev'd on other grounds*, 343 *N.J. Super.* 430, 778 *A.*2d 1132 (*App. Div.*), *certif. denied*, 170 *N.J.* 390, 788 *A.*2d 774 (2001). In that case the court ruled that the defendant was not collaterally estopped by a Florida judgment as a result of a jury verdict that had been vacated after a settlement during the appeal. *Id.* at 105–106, 712 *A.*2d 717. As here, the case was settled before the appeal was decided, and we remanded to the trial court, which vacated the earlier judgment. *Ibid.* As a result, we reject Perez's contention that Rent-A-Center is collaterally estopped from arguing that its rent-to-own contracts are not governed by RISA.[11]

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[11] Plaintiff also cites a California case, *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 *Cal. App.* 4th 1810, 54 *Cal. Rptr.* 2d 176, 191 (1996), but upon a thorough reading of the case it is evident that California's law on collateral estoppel differs significantly from the law of this State and we find the case unpersuasive.

II.

Rent-A-Center contends that rent-to-own contracts should not be considered "retail installment contracts" under RISA because it believes that when RISA is read as a whole it shows the Legislature's intent to apply the Act's restrictions only to situations where the consumer is obligated at the time of the agreement to pay the full purchase price. *See, e.g., Midlantic Nat'l Bank v. Peerless Ins. Co.*, 253 *N.J. Super.* 137, 143, 601 *A.*2d 243 (App. Div. 1992) (legislation should be read as a whole).

RISA is "part of a package of laws designed to protect consumers from overreaching by others, to protect consumers from overextending their own resources and also to promote the availability of financing to purchase various goods and services." *Girard Acceptance Corp. v. Wallace*, 76 *N.J.* 434, 439, 388 *A.*2d 582 (1978). RISA defines a "retail installment contract" as

> any contract, other than a retail charge account or an instrument reflecting a sale pursuant thereto, entered into in this State between a retail seller and a retail buyer evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes, or any part thereof, in two or more installments over a period of time. This term includes a security agreement, chattel mortgage, conditional sales contract, or other similar instrument and any contract for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full

> compliance with the terms of such retail installment contract.
>
> [*N.J.S.A.* 17:16C-1(b).]

The statute creates a three-part test for determining whether a contract is a "retail installment contract." First, the contract must be entered into between a retail seller and a retail buyer. Second, the transaction must reflect an exchange for goods or services, which are primarily for personal, family, or household purposes. Third, the contract must evidence an agreement to pay the retail purchase price of goods or services in two or more installments over a period of time. *N.J.S.A.* 17:16C-1(b).

Here, all three elements are not met. First, the rent-to-own contracts were not contracts "entered into in this State between a retail seller and a retail buyer." RISA defines a "retail seller" as:

> a person who sells or agrees to sell goods[12] or services under a retail installment contract or a retail charge account to a retail buyer, and

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12 RISA defines "goods" as

> all chattels personal which are primarily for personal, family or household purposes, including merchandise certificates and coupons to be exchanged for goods or services, having a cash price of $10,000.00 or less, but not including money or other choses in action. Goods shall not include chattels personal sold for commercial or business use.
>
> [N.J.S.A. 17:16C-1(a).]

The items Perez rented-to-own from Rent-A-Center fit within this statutory definition of "goods."

> shall include a motor vehicle installment seller.
>
> [*N.J.S.A.* 17:16C-1(c).]

A "retail buyer" is defined as:

> a person who buys or agrees to buy goods or services from a retail seller, not for the purpose of resale, pursuant to a retail installment contract or a retail charge account.
>
> [*N.J.S.A.* 17:16C-1(d).]

These definitions are circular because they refer back to the phrase "retail installment contract," which is a separately defined term under RISA. As will be set forth below, we do not find that a "retail installment contract" was entered into by these parties and, therefore, they do not qualify as a retail buyer and seller. Moreover, the record-in particular the rent-to-own contracts between Perez and Rent-A-Center, and the analysis of Rent-A-Center's business-does not reflect that Rent-A-Center's purpose is to sell or agree to sell goods under retail installment contracts. That some of those contracts ultimately may result in a sale is irrelevant.

The third element of the statutory test has also not been met. The contracts between plaintiff and defendant do not "evidenc[e] an agreement to pay the retail purchase price of goods or services . . . in two or more installments over a period of time." Perez never bound herself to pay the retail price over a period of time. In fact, she could return the items at any time and her payments would stop. It is undisputed that Perez was under no obligation to purchase the items she rented-to-own. The contracts are clear on that point. Simply stated, the rent-to-own contacts between Perez and Rent-A-Center do not fit RISA's definition of a "retail installment contract."

We are aware that the final clause of the statutory definition provides that "retail installment contracts" encompass leases with an "option" to purchase. Specifically, RISA provides that the term "retail installment contract"

> includes . . . any contract for the . . . leasing of goods by which the . . . lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, . . . and by which it is agreed that the . . . lessee . . . has the option of becoming, the owner of such goods upon full compliance with the terms of such retail installment contract.
>
> [*N.J.S.A.* 17:16C-1(b).]

The contracts between the parties, however, do not reflect an absolute unequivocal obligation on the part of Perez to purchase the items she leased or even be bound to the lease for any period of time. Even though Perez qualifies as a lessee with an option of becoming the owner of the goods, she never agreed to pay anything more than each individual weekly payment.

Hence, we are satisfied that the contracts between Perez and Rent-A-Center do not constitute "retail installment contracts" as defined by RISA and affirm the conclusion reached by the Law Division.

We are aware of only one published case in this State addressing whether rent-to-own contracts fall within RISA's definition of retail installment contract. *Green v. Cont'l Rentals*, 292 *N.J. Super.* 241, 678 *A.*2d 759 (Law Div. 1994). In *Green*, the plaintiffs alleged, among other things, that their rent-to-own contracts with the defendant were subject to RISA. *Id.* at 245, 678 *A.*2d 759. The contracts in *Green* were similar in their general nature, as well as in their specific terms, to the contracts between Perez and Rent-A-Center.

Each agreement provided that the customer is the "renter" or "lessee" of the property; that the customer does not own the merchandise and will not own it unless she makes the appropriate number of payments or chooses early to pay the full amount due; if the customer opts to purchase early, she would be credited with forty percent of all payments made towards the purchase price; that ownership will be obtained by renewing the lease for the specified number of weekly or monthly lease terms; that the lease is renewed for an additional term at the end of each term by making payment of the next rental payment; that if all the renewal payments are made, the customer will become the owner of the property without the payment of any additional consideration;[13] that the customer is fully responsible for the loss, theft, or destruction of the property from all causes; that the customer may terminate the agreement, at any time, by returning the property in its present condition and by payment of all rental payments then due; that at Continental's option, the agree-

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[13] In the case under review, to become the owner of the merchandise rented-to-own, Perez was required to make the specified number of rental payments plus an additional payment at the end of the rental term. Unlike in Green, the "expectation of the customer" in this case after making all the rental payments was not ownership of the property, but rather the expectation was the return of the property or the payment of additional consideration to acquire ownership. *Green, supra* (292 *N.J. Super.* at 253, 678 *A.*2d 759).

> ment terminates upon the customer's failure to renew the lease by making the rental payment next due.
>
> [*Id.* at 246, 678 *A.*2d 759.]

Viewing the transactions in "a realistic and common sense way," looking "beyond form to identify the substance of the transaction[s]," and penetrating the "technique" to "reach the economic verity of the transaction," the court concluded that the transactions were sales agreements, not leases. *Id.* at 252–253, 678 *A.*2d 759. Therefore, the court held that the rent-to-own contracts were retail installment contracts governed by RISA. *Id.* at 253, 257, 678 *A.*2d 759.

Green's reasoning is open to some criticism. The *Green* opinion did not perform a careful, text-based analysis of RISA's definition of a retail installment contract and much of the opinion focuses instead on whether the federal Truth in Lending Act (TILA), 15 U.S.C.A. § 1601 *et seq.*, applied to rent-to-own contracts, and a comparison between RISA and TILA. *Id.* at 247–252, 678 *A.*2d 759. *Green's* discussion of TILA is irrelevant to the case before us. In addition, based upon an amended regulation issued by the Federal Reserve Board, the Third Circuit Court of Appeals subsequently rejected *Green's* conclusion that TILA applied to rent-to-own contracts. *See Ortiz v. Rental Mgmt., Inc.*, 65 *F.*3d 335, 338–342 (3d Cir. 1995). *Green* is unpersuasive. We are satisfied that proper statutory analysis supports the conclusion that the rent-to-own contracts between plaintiff and defendant are not "retail installment contracts" as defined by RISA.

We note that the parties expended substantial effort discussing the law of other jurisdictions. The net result of that analysis is that New Jersey is exceptional because it has not adopted a statute designed exclusively to regulate the rent-to-own industry.

Given this situation, we attach no relevance to the out-of-state statutes and case law relied upon by the parties and by amici. The parties identify no jurisdiction in which the statutory language of a retail installment statute matches that of New Jersey.[14]

In the alternative, we conclude that even if RISA applied to Rent-A-Center's rent-to-own contracts the plaintiff cannot succeed on this appeal. The motion judge held that New Jersey's criminal usury statute, *N.J.S.A.* 2C:21-19, did not apply to the parties' rent-to-own contracts. He concluded that even if RISA applied to the contracts,[15] Perez would not be entitled to relief if she could not establish that Rent-A-Center had violated RISA by charging interest greater than the 30% per annum permitted under the criminal usury statute. Based upon these rulings, the judge granted summary judgment in Rent-A-Center's favor. We agree with those rulings and affirm the judge's decision.

Perez joined by amici, contends that RISA incorporates the protections of the criminal usury statute, *N.J.S.A.* 2C:21-19, and prohibits Rent-A-Center from charging a time-price differential greater than 30% per annum.

The phrase "time-price differential" means

> a figure representing the difference between the cash price of an item and the total cost of purchasing that item on credit. Method by

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[14] Amici contend that, with the exception of Wisconsin, Minnesota and Vermont, most state regulation of the rent-to-own industry is inadequate. See Appendix A for discussion of other state legislation.

[15] As discussed in Point I, the trial judge had held that rent-to-own contracts were no retail installment sales.

> which seller charges one price for immediate cash payment and a different (advance in) price when payment is made at future date or in installments and the former is the cash price and the latter the "time-price" or credit price and difference in price is the time-price differential.
>
> [Black's Law Dictionary 1032 (6th ed. 1991).]

See also N.J.S.A. 17:16C-1(*l*) (RISA's definition of time-price differential). The term "time-price differential" measures the interest charged on items purchased on credit. However, the law accords different treatment to "time-price differentials' charged in connection with sales transactions and "interest" charged in connection with loans or forbearances of money.

Rent-A-Center maintains that the judge reached the correct conclusion on the usury issue. It contends that the parties' rent-to-own contracts were not subject to any usury laws because they were not loans or forbearances of money, and because any payment of interest was dependent upon the will of the borrower. Rent-A-Center further contends that New Jersey subscribes to the time-price differential doctrine that places sales transactions, as opposed to loans and forbearances of money, beyond the reach of usury statutes.

As it is a question of statutory interpretation we review this issue *de novo*. *Manalapan Realty*, *supra* (140 *N.J.* at 378, 658 *A.*2d 1230). We hold that the criminal usury statute, *N.J.S.A.* 2C:21-19, does not apply to sales transactions, including retail installment sales governed by RISA, nor does it apply to the agreements between the parties in this case. Accordingly, we affirm the Law Division's grant of summary judgment.

Perez's argument seeking to apply the criminal usury statute is based upon legislative history, the purpose of RISA,

and the 1981 amendments to RISA and the criminal usury statute. The argument is unpersuasive. The 1981 amendments to RISA and the criminal usury statute were not intended to incorporate the criminal usury statute's interest rate limitations into RISA. Any such conclusion would be contrary to judicial precedent.

New Jersey courts have repeatedly held that the civil usury statute, *N.J.S.A.* 31:1-1, does not apply in the context of time-price differentials calculated with respect to sales transactions. The civil usury statute applies only in the context of loans or forbearances of money. *Sliger v. R.H. Macy & Co., Inc.*, 59 *N.J.* 465, 468–469, 283 *A.*2d 904 (1971); *Saul v. Midlantic Nat'l Bank/South*, 240 *N.J. Super.* 62, 70–75, 572 *A.*2d 650 (App. Div.), *certif. denied*, 122 *N.J.* 319, 585 *A.*2d 338 (1990); *Steffenauer v. Mytelka & Rose, Inc.*, 87 *N.J. Super.* 506, 510–517, 210 *A.*2d 88 (Ch. Div. 1965), *aff'd* 46 *N.J.* 299, 216 *A.*2d 585 (1966). In *Sliger*, 59 *N.J.* at 468–469, 283 *A.*2d 904 (citations omitted), the Court stated:

> The overwhelming majority of courts have held that if there is an agreement between the seller and buyer stating a cash price and, in the alternative, a credit price, the transaction, if bona fide, does not involve usury, even though the difference between the credit and cash price if considered interest would be usurious. The reason most frequently given for this conclusion is that an increase in price for a credit sale over the cash sale price is not a loan or forbearance of money.

Sliger went on to hold that revolving charge accounts were an example of a time-price differential, and not a loan or forbearance. Therefore, revolving charge accounts were not subject to the state's usury laws. *Id.* at 468–470, 283 *A.*2d 904.

Similarly, in *Steffenauer*, *supra* (87 *N.J. Super.* at 510–512, 210 *A.*2d 88), the Chancery Division stated:

The general rule of the majority of jurisdictions with respect to charges in transactions such as that under investigation here is stated in an annotation in 143 A.L.R. 238[, 242] (1943) as follows:

"It is well settled that where the contract of conditional sale is bona fide and the finance charge or other similar charge is included therein as a part of the total 'time' or credit price of the chattel which the purchaser thereby agrees to pay upon a deferred payment basis, the finance charge does not constitute usury, even though such charge, if considered as interest, would be in excess of the highest lawful interest upon the cash purchase price for the time payment thereof is deferred under the contract, provided of course that the transaction was what it purported to be and not in fact a loan. . . ."

Courts adopting the majority view usually exclude transactions of this nature from the ambit of the general usury statutes because of the real nature of the transaction involved. A good expression of a general approach is found in *General Motors Acceptance Corp. v. Weinrich*, 218 *Mo. App.* 68, 262 *S.W.* 425 (App. Ct. 1924), where it was stated:

"A loan may be cloaked in the outward form and appearance of a purchase, in which case that will not change the substance of the transaction or hide the usury. But if there is a real and bona fide purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken, at legal

> rates, for the unpaid purchase money. The reason is that the statute against usury is striking at and forbidding the exaction or receipt of more than a specified legal rate for the hire of money and not of anything else; and a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller. So that a sale in good faith of property, merchandise, or of an indorsement, or guaranty, or even of credit, if the seller has no other interest in the transaction, is valid and not open to the objection of usury whatever the price."

Steffenauer went on to hold that the civil usury statute was not applicable to a conditional sales contract for the sale of goods for commercial purposes. *Id.* at 516–517, 210 *A.*2d 88. The sale was not covered by RISA because the goods sold were for a commercials rather than a household purpose. Nevertheless, the court discussed RISA and explained that, through RISA's incorporation of the time-price differential doctrine, the Legislature had adopted a policy of exempting retail installment sales from the civil usury statute. *Id.* at 514–516, 210 *A.*2d 88.

Finally, and most recently, in *Saul*, *supra* (240 *N.J. Super.* at 73, 572 *A.*2d 650), we stated:

> RISA effectively codifies the "time price doctrine" and authorizes those persons subject to RISA to collect finance charges in an amount agreed to between buyer and seller without regard to the ceiling imposed by the general usury statute.

Even more emphatically, we stated: "Installment sales contracts . . . simply are not governed by the general usury statute." *Id.* at 75, 572 *A.*2d 650. *Saul* went on to hold that an

installment sale contract for an automobile, in the total amount of $15,000 (not covered by RISA because it was in excess of $10,000), was exempt from the civil usury statute because it was a sales transaction and not a loan or forbearance. *Id.* at 70–75, 572 *A.*2d 650.

Significantly, *Saul* was decided in 1990, after the 1981 amendment to RISA upon which Perez relies. Therefore, the 1981 amendment to RISA cannot be viewed as a repudiation of the time-price differential doctrine, exempting sales transactions from the state's usury laws. Although the Supreme Court has referred to time-price differentials as the equivalent of interest, *Singer*, *supra* (65 *N.J.* at 409, 323 *A.*2d 457), New Jersey courts have been equally clear that time-price differentials are not subject to the interest rate limitations of the civil usury statute. *Sliger*, *supra* (59 *N.J.* at 468–469, 283 *A.*2d 904); *Saul*, *supra* (240 *N.J. Super.* at 70–75, 572 *A.*2d 650); *Steffenauer*, *supra* (87 *N.J. Super.* at 510–517, 210 *A.*2d 88).

There are two requirements for a transaction to fall within the time-price differential exception to the state's usury laws: (1) the facts reveal an intent between the parties to consummate an actual purchase and sale (as opposed to a loan or forbearance of money); and (2) the purchaser must be fully aware of what he is doing and must have an opportunity to make an intelligent choice between buying the product or service for less now rather than more later. *Id.* at 512, 210 *A.*2d 88.

Here, the transactions between Perez and Rent-A-Center were essentially for the rental of goods. There was no loan or forbearance of money. Therefore, the transactions fall within the time-price differential exception to the usury laws, and the state's usury laws do not apply.

Sliger, *Saul*, and *Steffenauer* were concerned with the state's civil usury statute, *N.J.S.A.* 31:1-1(a). They did not consider application of the criminal usury statute to time-

price differentials charged in connection with retail installment sales.

Perez contends that the criminal usury statute, *N.J.S.A.* 2C:21-19(a), should be deemed applicable to the parties' transactions even if the civil usury statute is not. For this contention, she repeats her argument about the intent of the 1981 legislation. In addition, she relies on a footnote in *Saul*, *supra* (240 *N.J. Super.* at 66, n.1, 572 *A.*2d 650), in which we responded to an argument made by the defendant therein that "there is no statute regulating interest rates of retail installment sales of automobiles where loans exceed $10,000" by stating that, in fact, such loans would be limited "by reason of the criminal usury statute."

We perceive no reason to limit the reasoning of *Sliger*, *Saul*, and *Steffenauer* to civil usury. The reasoning of those cases is as applicable to criminal usury as it is to civil usury. Like the civil usury statute, the criminal usury statute applies only to loans or forbearances of money. *Compare N.J.S.A.* 31:1-1(a) *with N.J.S.A.* 2C:21-19(a). The transactions at issue in the cases just discussed were sales transactions, and not loans or forbearances of money. Thus, we perceive no principled basis upon which to distinguish *Sliger*, *Saul*, and *Steffenauer*, or to conclude that the criminal usury statute applies to the retail installment sales at issue in this case.

In light of *Sliger*, *Saul*, and *Steffenauer*, the legislative history cited by plaintiff loses persuasive power. If, through the 1981 amendments to RISA and the criminal usury statute, the Legislature had intended for the criminal usury statute to apply to RISA sales transactions, it would have been necessary for the Legislature to repudiate the holdings in *Sliger* and *Steffenauer* (*Saul* had not yet been decided). The record reveals no evidence of such an intent on the part of the Legislature.

The footnote from *Saul* upon which plaintiff relies is also unpersuasive regarding a determination on whether the

criminal usury statute applies to sales transactions in general, or RISA transactions in particular. The footnote is ambiguous. In it, we merely noted in passing that the criminal usury statute would apply to loans in excess of $10,0000 where the loan was secured in connection with the retail installment sale of an automobile. *Saul, supra* (240 *N.J. Super.* at 66, n.1, 572 *A.*2d 650). To the extent we appeared to be suggesting in dicta that the criminal usury statute applies to purely sales transactions, and not merely loans and forbearances of money, we reject that interpretation.

Finally, even if we were to hold that time-price differentials charged in connection with retail installment sales are subject to the interest rate limitations of the criminal usury statute, that would not mean that plaintiff has a private right of action to enforce the criminal usury statute by alleging a violation of RISA. RISA does not provide that violation of the criminal usury statute constitutes an independent violation of RISA.

Affirmed.

APPENDIX A

Like New Jersey, Wisconsin does not have a rent-to-own statute. Instead, Wisconsin treats rent-to-own contracts as consumer credit transactions subject to the Wisconsin Consumer Act. *See Burney v. Thorn Americas, Inc.*, 944 *F. Supp.* 762, 766-776 (E.D. Wis. 1996), *reconsid. granted in part*, 970 *F. Supp.* 668 (E.D. Wis. 1997); *LeBakken Rent-to-Own v. Warnell*, 223 *Wis.* 2d 582, 589 *N.W.*2d 425, 428-431 (App. 1998); *Rent-A-Center, Inc. v. Hall*, 181 *Wis.* 2d 243, 510 *N.W.*2d 789, 792-795 (App. 1993), *review denied*, 515 *N.W.*2d 715 (Wis. 1994); *Palacios v. ABC TV & Stereo Rental of Milwaukee, Inc.*, 123 *Wis.* 2d 79, 365 *N.W.*2d 882, 885-887 (App.), *review denied*, 122 *Wis.* 2d 783, 367 *N.W.*2d 223 (1985).

Minnesota has a rent-to-own statute, called a "Rental Purchase Agreement Act." *Minn. Stat. Ann.* §§ 325F.84 to 325F.97 (2004). However, the statute is non-exclusive. Rent-to-own contracts are also subject to Minnesota's Consumer Credit Sales Act and General Usury Statute. *See Fogie v. THORN Americas, Inc.*, 95 *F.*3d 45, 648, 650–654 (8th Cir. 1996), *cert. denied*, 520 *U.S.* 1166, 117 *S. Ct.* 1427, 137 *L. Ed.* 2d 536 (1997); *Miller v. Colortyme, Inc.*, 518 *N.W.*2d 544, 547–551 (Minn. 1994). Minnesota law defines the phrase "sale of goods" to include rent-to-own contracts, and uses "option" to purchase language which is similar but not identical to RISA. *Minn. Stat. Ann.* § 325G.15(5) (2004).

Vermont delegates authority to the attorney general to "adopt by rule standards for the full and conspicuous disclosure to consumers of the terms of rent-to-own agreements." *Vt. Stat. Ann.* tit. 9, § 41b(a) (2003). The Vermont attorney general has adopted such regulations. *Vt. Code R.* 06.031.015 (2004).[16]

Virtually every other state in the nation, as well as the District of Columbia, has adopted a statute explicitly regulating rent-to-own contracts as a distinct transactional form. The only exceptions are New Jersey, North Carolina and Wisconsin. *See Ala. Code* §§ 8-25-1 to 8-25-6 (2003); *Alaska Stat.* §§ 45.35.010 to 45.35.099 (2003); *Ariz. Rev. Stat.* §§ 44-6801 to 44-6814 (2004); *Ark. Code Ann.* §§ 4-92-101 to 4-92-107 (2004); *Cal. Civil Code* §§ 1812.620 to 1812.649 (2004); *Colo. Rev. Stat. Ann.* §§ 5-10-101 to 5-10-1001 (2004); *Conn. Gen. Stat.* §§ 42-240 to 42-253 (2004); *Del.*

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[16] Vermont also has a separate statute governing rent-to-own agreements for assistive devices (products used or designed to be used to increase, maintain, or improve any functional capability of an individual with disabilities). *Vt. Stat. Ann.* tit. 9, § 41c.

Code Ann. tit. 6, §§ 7601 to 7616 (2003); *D.C. Code Ann.* §§ 42-3671.01 to 42-3671.14 (2004); *Fla. Stat. Ann.* §§ 559.9231 to 559.9241 (2004); *Ga. Code. Ann.* §§ 10-1-680 to 10-1-689 (2004); *Haw. Rev. Stat. Ann.* §§ 481M-1 to 481M-18 (2003); *Idaho Code* §§ 28-36-101 to 28-36-111 (2004); 815 *Ill. Comp. Stat.* §§ 655/0.01 to 655/5 (2004); *Ind. Code* §§ 24-7-1-1 to 24-7-9-7 (2004); *Iowa Code* §§ 537.3601 to 537.3624 (2004); *Kan. Stat. Ann.* §§ 50-680 to 50-690 (2003); *Ky. Rev. Stat. Ann.* §§ 367.976 to 367.985 (2004); *La. Rev. Stat. Ann.* §§ 9:3351 to 9:3362 (2004); *Me. Rev. Stat. Ann.* tit. 9-A, §§ 11-101 to 11-122 (2004); *Md. Code Ann., Commercial Law* §§ 12-1101 to 12-1112 (2004); *Mass. Gen. Laws* ch. 93, §§ 90 to 93 (2004); *Mich. Comp. Laws* §§ 445.951 to 445.970 (2004); *Minn. Stat. Ann.* §§ 25F.84 to 325F.97 (2004); *Miss. Code Ann.* §§ 75-24-151 to 75-24-175 (2004); *Mo. Ann. Stat.* §§ 407.660 to 407.665 (2004); *Mont. Code Ann.* §§ 30-19-101 to 30-19-116 (2003); *Neb. Rev. Stat.* §§ 69-2101 to 69-2119 (2004); *Nev. Rev. Stat. Ann.* 597.010 to 597.110 (2004); *N.H. Rev. Stat. Ann.* §§ 358-P:1 to 358-P:12 (2004); *N.M. Stat. Ann.* §§ 57-26-1 to 57-26-12 (2004); *N. Y. Personal Property Law* §§ 500 to 507 (McKinney 2004); *N.D. Cent. Code* §§ 47-15.1-01 to 47-15.1-08 (2003); *Ohio Rev. Code Ann.* §§ 1351.01 to 1351.09 (2004); *Okla. Stat. Ann.* tit. 59, §§ 1950 to 1957 (2004); *Or. Rev. Stat.* §§ 646.245 to 646.259 (2004); 42 *Pa. Cons. Stat. Ann.* §§ 6901 to 6911 (2004); *R.I. Gen. Laws* §§ 6-44-1 to 6-44-10 (2003); *S.C. Code Ann.* §§ 37-2-701 to 37-2-714 (2003); *S.D. Codified Laws* §§ 54-6A-1 to 54-6A-10 (2004); *Tenn. Code Ann.* §§ 47-18-601 to 47-18-614 (2004); *Tex. Business and Commerce Code Ann.* §§ 35.71 to 35.74 (2004); *Utah Code Ann.* §§ 15-8-1 to 15-8-12 (2004); *Va. Code Ann.* §§ 59.1-207.17 to 59.1-207.27 (2004); *Wash. Rev. Code Ann.* §§ 63.19.010 to 63.19.901 (2005); *W. Va. Code* §§ 46B-1-1 to 46B-8-3 (2004); *Wyo. Stat. Ann.* §§ 40-19-101 to 40-19-120 (2004).

Commentators have criticized some state laws purporting to regulate the rent-to-own industry. They contend that the legislation was promoted by rent-to-own operators as a means to evade consumer protections generally applicable to credit sales and retail installment sales. *See* Lynn Drysdale and Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury in Today's Society*, 51 *S.C. L. Rev.* 589, 615 (Spring 2000); Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 *Wis. L. Rev.* 1221, 1256–1257 (2000); James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 *Ohio State L.J.* 751, 753, 821–822 (1991).

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
CAMDEN COUNTY
DOCKET NO.: CAM-L-21-03
A.D. #_____

HILDA PEREZ,	)	
	)	
Plaintiff,	)	
	)	TRANSCRIPT
vs.	)	OF
	)	DECISION
RENT-A-CENTER,	)	
	)	
Defendants.	)	

Place: Camden County Hall of Justice
101 S. 5th Street
Camden, New Jersey 08103-4001

Date: January 14, 2004

BEFORE

HONORABLE RONALD FREEMAN, J.S.C.

TRANSCRIPT ORDERED BY:

WILLIAM A. RIBACK, ESQ. (Sole Practitioner)

APPEARANCES:

None

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* * * *

[Page 3, line 1 thru Page 7, line 14:]

THE COURT: The Court is going to place upon the record its opinion or decision in the matter of Hilda Perez versus Rent-A-Center. That is under Docket Number CAM-L-21-03. Now, this was a matter that was heard before this Court on November 24th, 2003, wherein the Court had reserved its decision. The Court shall now place upon the record its decision.

The Court finds as a fact that plaintiff, Hilda Perez, contends that the rental agreement she executed on November 17th, 2001 was within the ambit of the Retail Installment Contract—Retail Installment Act and as a result thereof is additionally in violation of the Usury Laws, NJSA 2C:21-19 and Consumer Fraud Act, NJSA 58:8-1, *et seq.* I disagree.

On November 17th, 2001, Hilda Perez signed an agreement to rent a big screen t.v., television, dining room furniture and refrigerator with rental payments set forth in Exhibit D-6. The RISA Act defines agreements within this ambit as follows:

"(B) Retail Installment Contract means any contract, other than a retail charge account or an instrument reflecting a sale pursuant thereto, entered into in this State between a retail seller and a retail buyer, evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes or any part thereof, in two or more installments over a period of time. This includes a security agreement, shallow mortgage, conditional sales contract or other similar instruments and any contracts for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods. And, by which it agreed that the bailee or lessee is bound to become or has the option of becoming the owner of such goods upon full compliance with the terms of the retail installment contract."

In order for the Court to determine the intent of the signators of an agreement, the Court has—must look within the four corners of the document, which is the subject of this dispute; that is to say, Exhibit D-6. Exhibit D-6 is entitled in bold print at the very top. **"Rental Purchase Agreement".** The document further states, "This is a rental agreement only." The document further states, "This is a rental agreement only. You will not acquire any equity in the property by making rental payments. You have not agreed to purchase this property and will not acquire any ownership rights in it unless you have at your option paid the total of rental payments plus the option payment necessary to acquire ownership." The language continues, "As used in this agreement 'you' and 'your' means the person signing this agreement, 'we', 'us' and 'our', meaning the lessor/owner, (the rental company) 'agreement' means this rental agreement and 'property' means the rental property described above."

It is clear to this Court that the document executed by the plaintiff, Hilda Perez, is exactly the transaction for which she

intended to engage in when she signed the agreement with Rent-A-Center. It is clear that the plaintiff is not bound to continue payments upon her decision not to continue with the rental agreement and may at her sole option purchase the items and receive credit for any rental payments made earlier. The agreement entered into by Ms. Perez is replete with language reflecting that she is merely renting the property and not purchasing.

I direct counsel's attention to sections regarding initial payment terms. It's reflected—it's stated, "The rental rate weekly, $42.99, paragraph 1A. The weekly rental payment at $24"—strike that. "The weekly rental payment is $42.99 plus sales tax of $2.58." If you look at paragraph B, "The semi-monthly payment is $92.12 plus sales tax of $5.53." If you go to paragraph C, "The monthly rental payment is $171.96 plus sales tax of $10.32." Paragraph 2 is captioned, "Termination. You may terminate this agreement at the end of any weekly or monthly rental term." Looking at paragraph 4 it further states, "Ownership. We, that is to say Rent-A-Center, own the property you are renting."

Plaintiff further argues that this rental agreement binds her for payment of interest rates that additionally violate the law against Usury and the Consumer Fraud Act. Inasmuch as this Court finds that there exists no Retail Installment Contract between the parties, this Court concurs with the opinion expressed by the Honorable Louise D. Donaldson in the consolidated matter as set forth in *Utley versus Rent-A-Center, Inc.*, Docket Number CAM-L-2432-02.

Additionally, the Court has had the opportunity to review Staffaneur—*Staffaneur*, S-t-a-f-f-a-n-e-u-r, *Mytelka N. Rose, Inc.*, 8756—strike that, 87 New Jersey Super 506, a Chancery Division case, 1995, affirmed by the New Jersey Supreme Court, 46 New Jersey 299, 1996, and *Sal versus Midlantic National Bank/South*, 240 New Jersey Super 62 (Appellate Division) 1990, and this Court is satisfied that

neither the Usury nor the Consumer Fraud Act are applicable in this agreement executed—or applicable in the agreement executed by Ms. Hilda Perez and is not a Retail Installment Contract governed by the Retail Installment Act.

The motion for full summary judgment by defendant, Rent-A-Center, Inc., is hereby granted. It is hereby ordered that plaintiff's, Hilda Perez, motion for partial summary judgment is denied. Defendant Rent-A-Center, Inc.'s cross-motion for full summary judgment, as previously indicated, is hereby granted.

It is further ordered that the defendant's counsel shall serve a copy of this order on plaintiff's counsel within ten days from the date of the order. That is the decision of the Court. Thank you.

* * * *

APPENDIX F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CAMDEN COUNTY
DOCKET NO.: L-3697-94
A.D. #_____

DAWN ROBINSON AND THE CLASS,	)	
Plaintiff,	)	
vs.	)	TRANSCRIPT OF MOTION HEARING
THORN AMERICAS, *et al.*	)	
Defendants.	)	

Place: Camden County Superior Court
101 S. 5th Street
Camden, New Jersey 08103

Date: January 24, 1997

BEFORE:

HON. E. STEVENSON FLUHARTY, J.S.C.

TRANSCRIPT ORDERED BY:

ROBET D. RHOAD, ESQ. (Dechert Price & Rhoads)

APPEARANCES:

EZRA D. ROSENBERG, ESQ. (Dechert Price & Rhoads)
Attorney for the Plaintiff

DONNA SEIGEL MOFFA, ESQ.
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* * * *

[Page 3, line 1 thru Page 13, line 17:]

THE COURT: Okay. This is three and four. This is the Robinson versus Thorn Americas. We have a motion for summary judgment by Robinson and we have a cross-motion for summary judgment by Thorn Americas. The docket number is L-03697-94. Counsel can enter their appearances, please.

MS. MOFFA: Good morning, Your Honor. I'm Donna Seigel Moffa from the Tomar firm, on behalf of the plaintiff Dawn Robinson and the Class.

MS. RODRIGUEZ: Lisa Rodriguez, from the firm of Chimicles, Jacobson and Tikellis on behalf of Dawn Robinson and Class.

MS. CHANOW-DYKSTRA: Lisa Chanow-Dykstra, on behalf of Dawn Robinson and the Class.

MR. ROSENBERG: Ezra D. Rosenberg, from Dechert Price & Rhoads, on behalf of the defendant.

THE COURT: Sit down and relax. The first thing I note here is some suggestion that there's no case scheduling order in this case. Judge Weinberg never entered one?

PLAINTIFF'S COUNSEL: That's correct.

MR. ROSENBERG: That's correct, Your Honor.

THE COURT: Okay. I also note that you folks joined me on an occasion, September 3rd of '96, and as is my usual practice I suggested to counsel that you work it out and submit to me a proposed form of order with respect to the discovery, and I find, lo and behold, that nobody ever did that. Obviously, I don't calendar these things. I rely on counsel to let me know if you haven't been able to work it out or to submit to me a proposed form of order if you have. So, since you didn't do that you're leaving it up to me. I trust there's really no further discovery needed at this late date, right?

MS. RODRIGUEZ: That's correct, Your Honor.

THE COURT: Is that correct?

MR. ROSENBERG: Well, Your Honor,—

MS. RODRIGUEZ: There has been no expert discovery, and there was a—

THE COURT: All expert discovery shall be completed within 30 days from this date.

MS. RODRIGUEZ: Thank you.

THE COURT: Put together an order. That will be it. All other discovery is barred.

MR. ROSENBERG: Your Honor, we have an outstanding request for production of documents as to—

THE COURT: Well, do whatever you have to do under the law. I'm not dealing with that. I'm saying that all discovery is barred except for expert reports, and they'll be furnished and exchanged within 30 days from this date. And,

anybody that doesn't furnish or exchange the reports within 30 days from this date they will be barred from testifying. At the time of trial they'll make a motion. Put that in the order. How's that?

MS. MOFFA: Your Honor, I would assume too that to the extent that formally served requests have not been fully complied with any motions could be filed—

THE COURT: Make whatever—

MS. MOFFA: —within that time?

THE COURT: —motions you want,—

MS. MOFFA: Okay.

THE COURT: —but all discovery is now closed—

MS. MOFFA: Okay.

THE COURT: —except for the expert. Am I making myself clear, because I don't want to hear anymore about this?

MS. MOFFA: Yes, Your Honor.

THE COURT: For future reference, and those that are listening, when I rely on counsel to do something I do think I have a right to rely on counsel to do it, and if you can't do it let me know you can't do it and then I will do it for you as I just did now, and it took less than 30 seconds.

All right. Back to work. That problem is solved. This is a motion for summary judgment by the plaintiff as to liability on certain counts of the complaint. The plaintiff represents a Class of New Jersey consumers who entered into rent to own agreements with the defendant since—since April of 19 of 1988, that's April 19th of 1988.

The action alleges violation of New Jersey Consumer Protection laws. At the outset the Court notes Plaintiff's Exhibits 21, 22, 23 and 24 appear to be newspaper articles, and

as such are not competent legal evidence under Rule 1:6-6 unless, of course, there may be something contained therein that might be admissible as an exception of the Hearsay Rule under 803(b)(1).

Defendant claims—oh, the defendant's claim of alleged discovery violations by the plaintiff have no relevance at this time. Defendant has rights for discovery violation, if any exist, and if they choose not to seek court assistance in that regard they cannot complain in an effort to block a motion for summary judgment.

The defendant seems to suggest that the previous findings by Judge Weinberg in *Gallagher versus Crown* had no application to the matter of Robinson versus Thorn America. The argument seeming to be that they could not in any way, shape or form have been binding on Thorn America. The inference I think being that Thorn America wasn't involved in that previous determination and, therefore, couldn't be bound in any way. Well, if this is the argument then obviously counsel is dead wrong.

I've reviewed a lot of depositions in connection with this matter, and I found that *Dawn versus Robinson* was one of the cases dealt with on October 20th, 1995 and Thorn was represented by Michael Vassalotti, of Brown Connery. He introduced Mr. Dennis Dove, is it? I sometimes can't read my own writing. D-O-V-E?

MR. ROSENBERG: I'm not sure, Your Honor. I think there was a lawyer named Dodds involved.

THE COURT: Okay—who had been admitted pro hac vice in the Robinson versus—in the Robinson case, and—and so, therefore, they were there. They argued and any findings that were made by Judge Weinberg, assuming I choose to adopt them, would be binding on Thorn.

Now, what Thorn seeks to do is the same thing *Crown* sought to do the last time and that was to re-litigate that which was previously decided by Judge Weinberg.

Counsel for Thorn argues that Judge Weinberg did not find rent to own agreements were covered by R-I-S-A, RISA, and this is just not so. Judge Weinberg specifically stated, and I quote, "It is my opinion that the rent to own is another similar type instrument and, therefore, is controlled within the scope of the language of RISA." Based upon that finding he denied the motion for summary judgment.

Now, in *Green versus Continental Rails* 292 New Jersey Super 241 the Law Division in 1994 held that rent to own agreements are covered by the RISA, and the basis of the decision in *Green* in my humble opinion was contrary to what counsel argues; it was the remedial legislation is to be liberally construed to accomplish its social purposes. The literal terms give way to the spirit of the legislation and the words of the enactment may be expanded according to the manifest purposes of the statute.

It is appropriate to look beyond the forum to identify the substance of the transaction. The substance of these agreements requires that they be viewed as sales agreements and not leases. The customers are entitled to protection of RISA so they can clearly understand the cost of the intended inquisitions and that, in my opinion, was the logic and reasoning behind the finding of the *Green* case, totally contrary to what was argued by counsel.

The issue is primarily one of public policy, obviously. Should the agreements be interpreted as leases, strictly as leases, which would give way form over substance, or should they be realistically considered sales agreements? I choose, as I indicated, to follow Judge Weinberg's lead that the case was argued extensively, and he put some considerable thought into it, and I do not intend to re-litigate that issue once again.

I think Judge Alterman's opinion is well-reasoned and seems to comport with the general public policy of the state in holding that rent to own agreements are covered by RISA.

Now, in the case of *Gallagher versus Crown* counsel for Crown admitted that it had not complied with RISA. So, in that particular case this Court didn't have to make detailed findings with respect to any violations of RISA, because counsel, as I say, frankly admitted they hadn't even complied with it, the basis being that it wasn't applicable, but they, frankly, admitted they didn't comply with it. In the present case, however, counsel argues that even if RISA applies that there are material disputes of fact with respect to alleged violations.

With respect to the argument concerning down payment, the customers, it's argued, do not make a down payment. They don't pay a down payment. With respect to fees, officials fees, it's argued the customers don't pay officials fees.

It is claimed "That separate charges are set forth." It's claimed that there is a dispute with respect to cash price and time price differential, but the fact is that no cash price has set forth so that's a violation, and no prime—no price—no time price differential is set forth so this too is a violation.

The issue is not what the cash price should be, but rather whether one is set forth at all. So that's a violation, and, likewise, the time price differential, once again, none is set forth so, therefore, it would be a violation. And, the issue is not what t should be, but if none is set forth then obviously there is a violation.

It's interesting to note that Thorn argues that the time price differential cannot include amounts attributable to this—and I'm quoting now from counsel, because it's rather critical—"The time price differential cannot include amounts attributable to this bundle of values, speaking of *inter alia*, delivery and maintenance. Well, these two items are adver-

tised as free, and if there are charges for the same they certainly aren't free so that's an admission that there is a deceptive practice under CFA in that particular connection." So, this too would be a violation in the failure to set forth any cash price and any time price differential.

The Court notes, although counsel for Thorn argues that there is no need to comply with RISA and there are questions of fact re compliance of RISA, at another point in the argument they freely admit that they have not made the technical disclosures, and they characterize it as "technical disclosures, required by RISA," and I'm quoting that.

So, they have admitted, therefore, at one point in their argument that they haven't complied. But, be that as it may, I do find specifically as a matter of fact that RISA has been violated in that there was a failure to set forth a cash price. There was a failure to set forth the time price differential. The late fees were violations, because they were $5 without regard to the amount of delinquency or period of delinquency, and RISA limits the late fees to an amount not to exceed $5 for each installment or $5, whichever is less and default must be for ten days.

And, the Court notes the "late fees" charged by the defendant do not comply with RISA. So it doesn't matter what the defendant calls the fees, they are in reality late fees, and the don't comply so that's another area of violation.

The Court makes no finding as to any other alleged violations under RISA, but with respect to Count One, obviously since I made specific findings of the failure to comply with RISA there would be a summary judgment granted on that count.

With respect to consumer fraud, the plaintiff alleges the defendant has violated the Consumer Fraud Act. Defendant argues if RISA applies then the Consumer Fraud Act cannot,

because the defendant's conduct would be regulated by RISA and if so regulated the Consumer Fraud Act cannot apply.

And, it is true in some instances where there are sufficient regulations the Courts have held that the Consumer Fraud Act doesn't apply. The defense, of course, cited *Dalleman*, D-A-L-L-E-M-A-N, which is clearly distinguishable from the prevent case, doesn't even stand for the proposition as suggested. It's a situation involving the public, and I'm not going to go into detail with respect to that other than to observe that it's clearly distinguishable.

Likewise, with respect to the insurance industry, hospital industry and second mortgages, there are cases, yes, that do indicate that those industries are so heavily regulated that the Consumer Fraud Act would have no application.

But, once again, with respect to *Green versus Continental Rentals* the Court did held—did hold in particular with specificity that rent to own agreements do violate the Consumer Fraud Act *per se*. So, that's authority for that particular proposition.

The defendant has argued that the delivery, maintenance, repair and costs are costs to be included in pricing, and they specifically said delivery, maintenance and repair. And, if this is so, then, of course, they admit there's a violation of the Consumer Fraud Act, because these items are advertised as "free". And, to that extent the newspaper articles would be admissible under 803(b)(1).

Now, if they're supposed to be free as they are advertised then obviously charging for them would be false and misleading in every regard. And, obviously it would be intentional, but even if it wasn't intentional it would still fit within the Consumer Fraud Act, because it would be false and misleading, and it would be unconscionable commercial practice, deception, fraud, false pretense and misrepresentation, and none of those require proof of intent.

The fact that the defendant may have acted in good faith, of course, is unimportant. It is the capacity to mislead which is important. Certainly, if admitting—certainly, advertising something is free when, in fact, it's being charged for, that does have the capacity to mislead.

So, with respect to Count Two, I'm granting summary judgment in that regard based upon the previous opinion of *Green versus Continental* which finds as a fact that the violation of—that the Consumer Fraud Act is violated by the rent to own agreements and was a violation *per se*, and also I'm granting it because of the so-called free items which the defendant admits in their brief that they want to charge for. So he can't have it both ways. So, summary judgment is granted as to Count Two.

With respect to Count Three I'm denying summary judgment on that particular count.

With respect to Count Four, the illegal penalties, I previously made note of the fact that the late charges of $5 do not comport with RISA, and I set forth all the reasons why they don't, so that too would be a violation, and I grant summary judgment on Count Four.

The cross-motions obviously are denied. . . .

* * * *

APPENDIX G

* * * *

HILDA PEREZ, On Behalf of Herself And All Others Similarly Situated, Plaintiff-Appellant, vs. RENT-A-CENTER, INC., Defendant-Respondent	: : : : : : : : : : : : :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A 3379-03T1 On Appeal From Order Granting Defendant's Motion For Summary Judgment Sat Below: Hon. Ronald J. Freeman J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT RENT-A-CENTER, INC.

* * * *

2. The criminal usury statute is not applicable to transactions that, rate differences aside, would not be subject to the civil usury statute.

Steffenauer, *Sliger*, and *Saul* all happened to deal with the civil usury statute. Seizing on that, Plaintiff would have this Court believe that the Legislature intended to subject categories of transactions to the criminal usury statute, even though those same categories of transactions would not be subject to the civil usury statute. There is no basis in law or logic to support Plaintiff's distinction, and, indeed, subjecting Defendant's transactions to the criminal usury statute would run afoul of procedural due process protections.

First, the operative language of the civil and criminal usury statutes is substantively identical. On their face, both apply exclusively to the "loan" of money or other property, "directly or indirectly," and with the "forbearance" of money. *Compare* N.J.S.A. 31:1-1 with N.J.S.A. 2C:21-19. Both have been construed by our courts as requiring (1) a loan of money, (2) an absolute obligation to repay the principal and (3) the exaction of a greater compensation than that allowed by law for the use of the money. *Compare Dopp v. Yari*, 927 F. Supp. 814, 820 (D.N.J. 1996) (construing the criminal usury statute) *with Paley v. Barton Savings and Loan Assoc.*, 82 N.J. Super. 75, 81 (App. Div. 1964) (construing the civil usury statute).

Second, construing the two statutes in harmony is a constitutional imperative. There is no way that a person reading both the civil and criminal usury statutes would have notice that—rate differences aside—categories of transactions not subject to the former would be subject to the latter. Because it is a criminal statute, any ambiguities in N.J.S.A. 2C:21-19 must be construed strictly in favor of those accused of violating the law. *State v. Livingston*, 172 N.J. 209, 218 (2002).

Otherwise, due process rights are violated. *State v. Churchdale Leasing, Inc.*, 115 N.J. 83, 102 (1989).[23]

It is no surprise, then, that courts have applied exceptions to civil usury laws with equal force to criminal usury laws. *See generally Dopp v. Yari*, 927 F. Supp. 814 (D.N.J.

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[23] In this context, Plaintiff's reliance on the dictum in the footnote in Saul *v. Midlantic National Bank/South, 240* N.J. Super. 62, 66 n.1 (App. Div. 1990), for the proposition that transactions not subject to civil usury limitations might still be subject to criminal usury limitations (Pb43) is misplaced. The *dictum* in *Saul* was stated in the very specific context of whether a loan of greater than $10,000 by a bank in connection with a description of claims by a party that the retail installment purchase of a car was not subject to any regulation. The court indicated, in passing, that such a loan was subject to the criminal usury statute. Whether the court's *dictum* was accurate is debatable and appears to be counter to its embracing of the "time price" exception to usury in the body of its opinion. The court may have been confused by the Legislature's supplementing of RISA, bringing within its purview certain "loans," that might otherwise not necessarily be covered by the "time price" doctrine under the common law, *i.e.*, third-party loans by banks and finance companies in connection with retail installment sales of motor vehicles. *See* N.J.S.A. 17:16C-40 and 40.1. The Legislature, recognizing that these third party transactions might otherwise be subject to usury laws, extended the "time price doctrine" to cover them, specifically excepting them from civil usury laws. *See* N.J.S.A. 17:16C-40.1 ("Notwithstanding the provisions of R.S. 31:1-1 . . . "). Whether these specific third-party loans are nevertheless subject to the criminal usury statute is an open question, but has no bearing on either the common law exception of non-third party "time price" transactions from all usury limitations or RISA's codification of same (as Plaintiff implicitly concedes (Pb35-36)).

1996) (applying New Jersey law and holding that exceptions to application of the civil usury statute applies with equal force to the criminal usury statute). This includes the "time price" exception. *See, e.g., Gecht v. Suson*, 278 N.E.2d 193, 197 (Ill. App. 1 1971) (applying time price doctrine to criminal usury statute); *First Nat. Bank of Ottawa v. Larkins*, 444 N.E.2d 818, 820 (Ill. App. 3 1993).

* * * *

APPENDIX H

* * * *

HILDA PEREZ, On Behalf of Herself and All Others Similarly Situated,	:	SUPREME COURT OF NEW JERSEY
	:	DOCKET NO. 57,572
Plaintiff-Appellant,	:	CIVIL ACTION
vs.	:	Sat Below:
RENT-A-CENTER, INC.,	:	HON. JAMES J. PETRELLA
Defendant-Respondent.	:	HON. JACK L. LINTNER
	:	HON. LORRAINE C. PARKER

DEFENDANT-RESPONDENT RENT-A-CENTER, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE COURT'S MARCH 15, 2006 DECISION

* * * *

II. ALTERNATIVELY, THE COURT SHOULD CLARIFY THAT ITS DECISION APPLIES ONLY PROSPECTIVELY, OR WITH RETROSPECTIVE EFFECT LIMITED ONLY TO THE PLAINTIFF.

A. Retrospective Application of the Decision's New Constructions of RISA and the Criminal Usury Statute Would Violate Constitutional Guarantees of Due Process.

When a court announces new rules governing conduct and applies those new rules—including a criminal statute—to completed conduct, the decision violates due process's requirement of fair notice and its rule of lenity.

The U.S. Supreme Court has emphasized that due process requires notice that particular conduct is unlawful before the government can deprive an individual of property: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (notice is "the first essential of due process of law").

This rule of law is hardly new. In *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), Chief Justice Marshall observed that in "private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." *Id.* at 110. "[T]he antiretroactivity principle finds expression in several provisions of our Constitution," including the Due Process Clause. *Landgraf*, 511 U.S. at 266.

The Due Process Clause restricts not just the imposition of retroactive criminal liability, but also of civil liability. *See, e.g., BMW of N. Am. v. Gore*, 517 U.S. 559, 574 n.22 (1996) ("[T]he basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by

civil *penalties*.") (citation omitted; emphasis in original). In *Landgraf*, the Court explained that "compensatory damages are quintessentially backward looking. Compensatory damages may be intended less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants." 511 U.S. at 282 (emphasis in original).

Retroactive imposition of liability implicates due process whether the new rule is announced through the passage of new legislation or through a judicial decision. As the Supreme Court explained in *Bouie*, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. at 352. An individual is no less deprived of property without notice by a judicial act than by a legislative one. *Id.* at 353 ("Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law."). Whatever the origins of the new rule, the key constitutional question is whether the parties made subject to it received fair notice of its substantive limitations on conduct so they might conform to its mandate.

In *Bouie*, the U.S. Supreme Court reversed a decision of the South Carolina Supreme Court that issued and applied a new interpretation of a criminal trespass statute to civil rights demonstrators arrested under the statute. 378 U.S. at 362; *id.* at 350 n.2, 355-56. The Bouie Court noted that until a decision one year after the defendants' conduct, "the South Carolina cases construing the [criminal trespass] statute uniformly emphasized the notice-before-entry requirement, and gave not the slightest indication that that requirement could be satisfied by proof of the different act [applicable in the civil context] of remaining on the land after being told to leave." *Id.* at 356-57. In short, prior constructions of the criminal

statute did not provide fair notice to the public that the criminal statute would be construed as incorporating a doctrine found only in civil trespass cases. *Id.* at 359. The U.S. Supreme Court thought "it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed them by the Due Process Clause." *Id.* at 362. While the new construction was "of course valid for the future, it [could] not be applied retroactively, anymore than a legislative enactment [could] be." *Id.*

This case cannot be persuasively distinguished. The decision trenches on RAC's due process rights because it announces new constructions of statutes and then applies them to preexisting conduct, threatening RAC with confiscatory and punitive liability. Specifically, the decision announces three new rules, each of which emerged without fair notice.

First, the decision concludes that the language of RISA is ambiguous and construes it to apply to rent-to-own contracts. Op27-28. The starting point for this conclusion is the admission that the language of RISA does not clearly apply to rent-to-own transactions. Op26 ("rent-to-own contracts are not a perfect fit with the words of [RISA]").[9] In light of this imperfect fit, the decision invokes the rule that "[t]he spirit of the legislative direction prevails over the literal sense of the terms." Op26. Then, the decision relies on "the well-established notion that remedial statutes like RISA should be liberally construed to achieve their salutary aims." Op27.

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[9] *Cf. Helton v. Fauver*, 930 F.2d 1040, 1047 (3d Cir. 1990) (it was "a telling indication" that a holding was "an unforeseeable change in the law" where the New Jersey Supreme Court conceded that the rule it announced was "perhaps not starkly evident before today's decision").

Applying these concepts, the decision concludes that interpreting RISA according to its language "would be an intolerably narrow interpretation." Op31.

While this method of reasoning might be appropriate prospectively, it deprives RAC of notice if applied retrospectively. *See Bouie*, 378 U.S. at 362. Even if a broad prospective interpretation of RISA were favored in order to support remedial aims, the principle against retroactivity, grounded not just in policy considerations but in the Due Process Clause itself, trumps. *See Landgraf*, 511 U.S. at 266 ("[A] justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application."); *id.* at 285-86 ("[T]hat retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity."). Construing RISA against RAC runs contrary to the requirements of due process: instead of "struggl[ing] hard against a construction which will, by a retrospective operation, affect the rights of parties," *Schooner Peggy*, 5 U.S. (1 Cranch) at 110, the decision does what the U.S. Supreme Court has refused to do—to "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before" a retroactive change made certain conduct unlawful. *Landgraf*, 511 U.S. at 284.

Second, the decision concludes that time-price differentials constitute interest on a loan or forbearance for the purposes of usury law. Op37. Previously, no New Jersey appellate court had ever applied the State's usury laws to a transaction that did not involve a loan of money. To the contrary, four decades of decisional law in New Jersey preceding the decision in this case laid down the unequivocal doctrine that time-price differentials did not constitute interest on a loan or

forbearance for the purposes of usury statutes.[10] Indeed, the decision admits that under *Steffenauer* "the time price doctrine insulated retail installment sales from usury" law. Op19. It is irrelevant that that these cases were decided under the general usury statute, not the criminal usury statute that contains somewhat different language, because the cases relied not on the language of the statutes but on the background time-price differential doctrine that applied to both types of usury. *See Steffenauer*, 46 N.J. at 300; *Sliger*, 59 N.J. at 469; Saul, 240 N.J. Super. at 70. Moreover, both usury statutes are similar in the most crucial respect—applying only to "loans or forbearances" of money. *See Dopp v. Yari*, 927 F. Supp. 814 (D.N.J. 1996).

Third, the decision concludes that RISA, a civil statute, incorporates the standards applicable to criminal usury. Op37. In doing so, the decision explains that "there is nothing on the face of the statute that would be violated" by applying it to RISA. *Id.* That may be true—but only because at this point in the opinion the Court already had announced its second new rule, that "the time-price differential is, in fact, 'interest'" on a loan of money. *Id.*

Without this new rule, however, the language of both statutes argues against incorporation of the criminal standard:

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[10] *See Steffenauer v. Mytelka & Rose, Inc.*, 46 N.J. 299, 300 (1966) (declaring that a transaction that was not a loan, but a sale, was "hence beyond the general usury statute"); *Sliger v. R.H. Macy & Co.*, 59 N.J. 465, 469 (1971) ("The time-price doctrine is firmly imbedded in this state."); *Saul v. Midlantic Nat'l Bank*, 240 N.J. Super. 62, 70 (App. Div. 1990) ("It has long been established in this state that the general usury statute does not apply to finance charges imposed on a purchaser in connection with an installment sale.").

RISA explicitly permits parties to set the time-price differential in retail installment contracts "as agreed to," without reference to a limitation imposed by any usury statute. N.J.S.A. 17:16C-41. The criminal usury statute states a threshold requirement that only "loans and forbearances" are within its purview. The 1981 amendment in no way altered that threshold requirement, which for generations had excluded time-price differential transactions. Without the new rule created in this case, the Legislature's concurrent amendments to RISA (to replace the 10% limitation on time-price differentials with the "as agreed to" provision) and the criminal usury statute (to reduce the interest rate cap on "any loan or forbearance" from 50% to 30%) could not mean that when the Legislature wrote "as agreed to" it meant to write "as agreed to, up to 30%" in RISA or to change the scope of "loans or forbearances" in the criminal usury statute—and, certainly, does not give any person the constitutionally requisite notice of such a change.

To the contrary, the Legislature was writing against the backdrop of the well-established time-price differential doctrine, which held that time-price differential transactions were not loans or forbearances. Op16 ("Historically, the law treated the taking of interest in connection with the sale of goods as entirely different from the taking of interest on a loan of money *per se*."). The doctrine, in other words, created two distinct categories of transactions, and the Legislature treated them differently: at the same time it removed the limitation on time-price differentials, it imposed stricter limitations on usury. Only when the statutes are considered in light of the new abrogation of the time-price differential doctrine does the incorporation of the criminal usury statute not contravene the plain text of RISA.

While this third rule may be a logical extension of the new second rule, it is telling that the decision fails to point to a single case since the 1981 amendments that applied the cap

in the criminal usury statute to a pure installment sale transaction. Op32-41; *see Bouie*, 378 U.S. at 356-57.[11] Although the pre-existing law gave no warning that this civil statute would be construed as incorporating a standard found only in a criminal statute, *cf. id.* at 359 (due process prohibited incorporating without notice a civil rule into a criminal statute), the Court interpreted RISA as incorporating the 30% cap. Op41. RAC could not have foreseen this change.

This change is especially troubling because it involves the interpretation of a criminal statute. When construing criminal statutes, the rule of lenity—grounded in fundamental notions of due process—provides yet another reason why these statutes must be construed strictly. *Dunn v. United States*, 442 U.S. 100, 112 (1979) (explaining that the rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at

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[11] Saul neither constitutes such an application nor "holds that the criminal usury statute is applicable to retail installment sales." Op40 (*citing* 240 N.J. Super. at 66 n.1). The Appellate Division itself explicitly rejected in the decision below the very construction of *Saul* that the majority opinion found persuasive. The Appellate Division concluded that the *Saul* footnote, on which the majority places great reliance, "is ambiguous" and "unpersuasive" "passing . . . *dicta*," 375 N.J. Super. at 88, suggesting at most that a "loan" of money (in that case, financing by a third-party financier) might be subject to criminal usury laws. Far from applying the criminal usury statute, *Saul* rejected application of the virtually identical civil usury statute, finding that the statute did not restrict time-price differentials. *See* 240 N.J. Super. at 73. Ambiguous lower-court *dicta* disavowed even by its authors cannot possibly provide the notice and fair warning to the public that due process requires before a novel statutory construction can be applied to completed conduct.

peril of indictment, whether his conduct is prohibited"); *State v. Churchdale Leasing, Inc.*, 115 N.J. 83, 102 (1989). The Supreme Court has made clear that if a statute has criminal applications, "the rule of lenity applies" to the interpretation of the statute "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005). And although this is a civil case, in response to this decision New Jersey's highest law enforcement official has raised publicly the possibility of a criminal action against RAC (n.2, *supra*).

Each of these new rules changed the law that was in effect at the time of RAC's conduct without notice. That these three new rules, each unforeseeable individually, would be announced and combined in a single opinion amplifies the lack of notice inherent in the Court's decision. This sequence of reasoning, even if it is valid, was simply not the law (or reasonably foreseeable as becoming the law) on April 23, 1999—the date on which Plaintiff would like her putative class to commence. Such a retroactive application in the absence of notice violates "[e]lementary notions of fairness," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 , 417 (2003), and the rule of lenity. Moreover, applying the decision retrospectively to all residents of New Jersey who rented from any of RAC's 43 New Jersey locations during the last seven years would, to put it mildly, "substantially increas[e]" RAC's monetary liability and therefore violate the due process rights guaranteed by the U.S. and New Jersey Constitutions. *Landgraf*, 511 U.S. at 284.

B. Fairness and Justice Dictate that Any Retrospective Application of the Decision Should be Limited to Plaintiff, and Not the Putative Class.

Settled state juridical principles dictate the same result: "[O]ur tradition is to confine a decision to prospective application when fairness and justice require." *Montells v. Haynes*, 133 N.J. 282, 297 (1993); *Coons v. Am. Honda Motor Co., Inc.* 96 N.J. 419, 426 (1984) (in some circumstances, "sound public policy grounds may justify limiting the retroactive effect of overruling precedent").

Retroactive effect has been limited in cases involving statutory construction:

> [T]he practice [of giving decisions prospective effect only] . . . may also apply to situations where a court renders a first-instance or clarifying decision in a murky or uncertain area of the law but under circumstances where members of the public or public entities could be found to have previously and not unreasonably relied on a different conception of the state of the law.

Oxford Consumer Discount Co. v. Stefanelli, 104 N.J. Super. 512, 521 (App. Div. 1969) (internal quotation marks omitted).

Montells is illustrative. In limiting its decision regarding the Law Against Discrimination's statute of limitations to prospective effect, this Court reasoned that:

> Prospective application is appropriate when a decision establishes a new principle of law by overruling past precedent or by deciding an issue of first impression. Together with those considerations, we must also weigh whether retroactivity furthers the underlying purpose

> of the rule and whether retroactive applications could produce substantial inequitable results.

Id. at 295 (internal citation omitted). This Court noted that "[w]hen plaintiff filed her complaint in May 1989, few cases had considered the issue of the appropriate statute of limitations under LAD" and that there was conflicting authority, from both state and federal courts, on the issue. *Id.* at 296.

Here, there is an even more compelling case for prospective application than in *Montells*. Prior to this decision, no appellate court had ever applied RISA to rent-to-own transactions. No appellate court had ever applied the criminal usury statute—or any usury statute—to anything except loans or forbearances of money. No appellate court had ever held that the criminal usury statute's limitations were incorporated in RISA.

The Appellate Division noted that this case raised issues of first impression, and Plaintiff emphasized this point in her Petition for Certification. *See* Plaintiff's Pet. for Certification (Mar. 3, 2005) at 1. Prior to this decision, two trial court judges and three Appellate Division judges had ruled that the criminal usury statute did not apply to RAC's transactions. Indeed, since November 2002, RAC has been operating under the rulings of two trial courts and the Appellate Division that its transactions were legal. This Court repeatedly recognized that the statutes in question did not facially apply to RAC's agreements and that a century of precedent had established the time-price doctrine exception to usury. Op16-17.

Moreover, RAC's reliance was particularly reasonable given the fundamental precept that changes in the common law must be express:

> Statutes which impose duties or burdens or establish rights or provide benefits which were not recognized by the common law have fre-

> quently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in the common law.

Warnig v. Atlantic County Special Servs., 363 N.J. Super. 563, 570 (App. Div. 2003). *See also Velazquez v. Jiminez*, 172 N.J. 240, 257 (2002).

Retrospective application would be particularly unfair if the Court allowed application of these new rules to an as-yet-uncertified class ofg tens of thousands of customers seeking treble damages under the Consumer Fraud Act for transactions dating back seven years. Thus, assuming other aspects of this motion are denied, fairness and justice dictate that the decision not apply to contracts entered into prior to this decision, other than Ms. Perez's.

CONCLUSION

For all of the foregoing reasons, we respectfully request that the Court reconsider its opinion and/or clarify that its retrospective effect is limited, at most, to Plaintiff.

Respectfully submitted,

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No. 06-657

In the Supreme Court of the United States

RENT-A-CENTER, INC.,

Petitioner,

v.

HILDA PEREZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court has jurisdiction under 28 U.S.C. § 1257(a) to review the New Jersey Supreme Court's interlocutory decision below vacating a judgment for Petitioner Rent-A-Center on purely state-law grounds, ordering reinstatement of Respondent Perez's state-law claims, and remanding for further proceedings on the merits in the state trial court, where Rent-A-Center has moved for summary judgment on state-law grounds.

(2) Whether Rent-A-Center preserved its federal due process argument raised here when the state courts below never addressed the argument and when Rent-A-Center made no argument based on federal law in its state-court briefing prior to its petition for rehearing in the New Jersey Supreme Court.

(3) Whether the decision below violated Rent-A-Center's right to fair warning under the Fourteenth Amendment's Due Process Clause when it construed state consumer protection statutes exactly as every lower state court did in previous cases, including several where Rent-A-Center was a losing party and chose to settle rather than appeal.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The New Jersey Supreme Court issued its decision on March 15, 2006. The decision reversed a lower court judgment for Petitioner Rent-A-Center and then remanded the case to the state trial court "for reinstatement of [Respondent Hilda] Perez's complaint and for such further proceedings as are warranted." 38a. On remand, Rent-A-Center has moved for summary judgment on state-law grounds. That motion is pending. Since there is no final state court judgment or decree for any party, and the parties are now litigating Perez's state-law claims in the state trial court, this Court lacks jurisdiction under 28 U.S.C. § 1257(a). Moreover, the New Jersey Supreme Court addressed no federal law question because none was raised until Rent-A-Center petitioned for rehearing in that court. The decision below thus does not draw into question any matter of federal law. Accordingly, the Court lacks jurisdiction under § 1257(a) to review this interlocutory state court decision addressing only matters of state law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New Jersey's Retail Installment Sales Act provides in relevant part:

> "Retail installment contract" means any contract . . . entered into in this State between a retail seller and a retail buyer evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes,

> or any part thereof, in two or more installments over a period of time. This term includes *a security agreement, chattel mortgage, conditional sales contract, or any other similar instrument* and any contract for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of such retail installment contract.

N.J. STAT. ANN. § 17:16C-1(b) (emphasis added to language omitted from Rent-A-Center's petition).

> A retail seller . . ., under the provisions of this act, shall have authority to charge, contract for, receive or collect a time price differential as defined in this act, on any retail installment contract evidencing the sale of goods or services in an amount or amounts as agreed to by the retail seller . . . and the buyer . . . on all . . . goods and services.
>
> *The retail installment contract may provide for an increase, or may provide for a decrease, or both, in the time price differential applicable to the contract. No increase during the entire loan term shall result in an interest rate of more than 6% per annum over the rate applicable initially, nor shall the rate be raised more than 3% per annum during any 12-month period. The lender shall not be obligated to decrease*

> *the interest rate more than 6% over the term of the loan, nor more than 3% per annum during any 12-month period. . . .*

N.J. STAT. ANN. § 17:16C-41 (emphasis added to language omitted from Rent-A-Center's Petition).

New Jersey's criminal usury statute provides in relevant part:

> *[N]otwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction*, any loan or forbearance with an interest rate which exceeds 30% per annum shall not be a rate authorized or permitted by law . . .

N.J. STAT. ANN. § 2C:21-19 (emphasis added to language omitted from Rent-A-Center's petition).

INTRODUCTION

This case presents an interlocutory decision by a state's highest court that construed state statutes and then remanded for proceedings on the merits of the plaintiff's state-law claims. The Supreme Court of New Jersey held that Rent-A-Center's "rent-to-own" contracts with consumers for the installment purchase of household goods were covered by New Jersey's Retail Installment Sales Act ("RISA") and its 30% ceiling on interest. In so ruling, the court entered no judgment for any party. Nor did it address any federal law question since none was raised until Rent-A-Center petitioned the court for

rehearing. Accordingly, this Court should not grant review to address Rent-A-Center's belated federal due process claim here because (1) the Court lacks jurisdiction to review this interlocutory state court decision; (2) the federal-law claim is waived; and, (3) in any event, the decision below implicates no factually supported federal law question.

Rent-A-Center's claim that the decision below applying RISA and its incorporation of the state's usury ceiling to rent-to-own sales was so unforeseeable as to violate its due process right to fair notice is wholly unfounded. At the time this case was filed in 2002:

- Every New Jersey court that faced claims like Perez's here had ruled, as the New Jersey Supreme Court did below, that rent-to-own contracts are installment sales covered by RISA and/or that such sales are covered by the state's criminal usury ceiling;

- two New Jersey courts had entered summary judgment *against Rent-A-Center itself* or companies it owned on one or both of these issues, whereupon Rent-A-Center settled those cases instead of appealing the adverse judgments it received; and

- *no New Jersey court* had ever held that rent-to-own contracts were exempt from RISA, or that RISA did not cap interest rates, despite Rent-A-Center's contention that this was the settled law.

Viewed against this backdrop, Rent-A-Center's claim of a due process violation for lack of fair warning shows an ostrich-like

pretense. Decades of New Jersey law and Rent-A-Center's own litigation history belie the company's assertion that the decision below enacted a "sea change" by "announcing new and unforeseeable state-law rules." Pet. at i.

To the contrary, Rent-A-Center made a conscious business decision to continue charging New Jersey customers exorbitant interest rates after having multiple state courts hold these charges unlawful, and after paying significant sums to settle those cases. In light of this state-law backdrop, Rent-A-Center's claim of a lack of fair warning creating a due process violation is unfounded and implausible at best.

If applied to these facts, Rent-A-Center's due process theory would revolutionize this Court's role in supervising state-court adjudication of state-law matters. The decision below confirmed New Jersey's prior statutory and case-law. Indeed, the *only* decisions that were reversed were those of the lower courts in this case. A holding that this decision violated Rent-A-Center's due process right to fair notice under these circumstances would create a federal constitutional question in *every* case where a state's highest court decides a question of first impression, no matter how consistent that decision is with statutory and prior lower-court case law. There is no support in this Court's or any other court's precedent for such a sweeping and seemingly boundless expansion of due process. Thus, there also is no split of authority on the question presented that would merit this Court's review.

STATEMENT OF THE CASE

1. The Underlying Causes of Action

In 2002, Respondent Hilda Perez filed this case in the Superior Court of New Jersey, Camden County, after Rent-A-Center had initiated a collection action against her. Pet. App. 8a. Perez alleged that Rent-A-Center's "rent-to-own" contracts for installment purchases of household goods violated New Jersey's Retail Installment Sales Act ("RISA"), N.J. STAT. ANN. §§ 17:16C-1, *et seq.*, and Consumer Fraud Act ("CFA"), N.J. STAT. ANN. §§ 56:8-1, *et seq.*, by charging her interest in excess of the state's 30% usury ceiling that RISA incorporates. Pet. App. 8a. She based her claims on the fact that Rent-A-Center was charging her approximately double the cash price to purchase these goods over time, representing annual interest rates of 80% and higher. *Id.* 5a, 8a. Perez sought relief on behalf of herself and a class of New Jersey consumers who entered into these transactions with Rent-A-Center on or after April 24, 1999. The class dated back to April 24, 1999 because, as discussed below, that is when Rent-A-Center had finalized a $60 million settlement of prior cases in which New Jersey consumers asserted claims identical to those here, and Rent-A-Center twice had summary judgment entered against it.

2. The Prior State of Applicable New Jersey Law, Including Decisions Against Rent-A-Center

When Perez initiated this action in 2002, every New Jersey court that had addressed either or both of the statutory claims she made against Rent-A-Center agreed with her position that (i) New Jersey's RISA applies to rent-to-own contracts; and (ii)

RISA incorporates the state criminal usury statute's 30% ceiling on interest charges.

First, in *Saul v. Midlantic National Bank/South*, 572 A.2d 650 (N.J. Super. Ct. App. Div. 1990), New Jersey's appellate division held that the 30% criminal usury ceiling applies to charges in installment purchase contracts. *Id.* at 652 n.1. The court reached this conclusion despite also finding that state's lower *civil* usury limit did not apply to retail installment sales under RISA (which covers such sales for up to $10,000) or otherwise. *Id.* at 654-56.[1]

The basis for *Saul*'s distinction between these two usury rules is found on the face of the applicable statutes. For retail installment sales, RISA allows parties to contract "in an amount or amounts as agreed to by the retail seller . . . and the buyer." N.J. STAT. ANN. § 17:16C-41. This preempts any application of the civil usury statute where RISA applies. But New Jersey's criminal usury statute is *not* preempted because it contains a savings clause stating that its higher ceiling applies "*notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction.*" N.J. STAT. ANN. § 2C:21-19(a). These

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[1] Rent-A-Center tries to dismiss the appellate court's statement of law as a mere "suggestion in dicta," (Pet. at 13 n.6), but provides no authority that recognizes a federal due process right to rely on interpretations of state law that are *directly contrary* to a state appellate court's dicta. At the very least, this "suggestion in dicta" put Rent-A-Center on notice that its preferred interpretation of state law was not a sure thing.

preemption and savings provisions were simultaneously enacted into the statutes in 1981. *See* Pet. App. 28a-32a.

Second, following the 1981 amendments to these statutes, in *Green v. Continental Rentals*, 678 A.2d 759 (N.J. Super. Ct., Law Div. 1994), the court held *both* that RISA applies specifically to rent-to-own contracts and that it incorporates the state's 30% criminal usury ceiling. *Green* held that RISA was enacted as remedial legislation meant to "protect consumers from over-reaching by others" and "protect them from over-extending their resources." *Id.* at 764. As such, RISA required the court "to look beyond form to identify the substance of the transaction," so that the customer's ability to acquire ownership meant that the transaction met RISA's definition of an installment sale. *Id.* Having found that these rent-to-own transactions are in fact installment sales, the court held that the difference between an item's cash and installment price was interest that was governed, as in *Saul*, by the state's 30% usury ceiling on interest charges. *Id.* at 766.[2]

Third, following *Green*, similar lawsuits were filed against several rent-to-own companies in New Jersey alleging, among other things, that these transactions were subject to RISA and violated the 30% interest-rate cap. In *Robinson v. Thorn*

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[2] Rent-A-Center tries to dismiss *Green* in footnotes as having "swam against the tide" of New Jersey law. (Pet. 10 n.4). Even if this were true (which it is not), that is no answer to whether the *existence* of this published opinion deciding both of these issues against a rent-to-own company gave Rent-A-Center yet further notice that its preferred interpretation of these laws could be wrong.

Americas, Inc., No. CAM-L-3697-94 (N.J. Super. Ct., Law Div.), the court followed *Green* in granting summary judgment for consumers and against Rent-A-Center (which owned the defendant company) on RISA's application. *See* Pet. App. 87a-91a. *Robinson* held, like *Green*, that rent-to-own transactions are installment sales covered by RISA, *id.*, and entered judgment against Rent-A-Center for RISA violations that resulted in over $100 million in damages. *See* Rent-A-Center, Inc. Form 10-K405/A (April 28, 1999) at 13 (available at http://edgar-online.com/1999/04/28/15/0000950134-99-003298/Section19.asp). Rather than obtaining appellate review of this judgment against it, Rent-A-Center chose to settle these class claims for $48.5 million. *Id.*

At the same time it settled *Robinson*, Rent-A-Center settled, for an additional $11.5 million, two other New Jersey cases where consumers raised identical claims against rent-to-own companies it acquired. *Id.* at 15-16. In one of these cases, *Gallagher v. Crown Leasing Corp.* (cited in *Robinson*, Pet. App. at 86a, 88a), the New Jersey court held, as in *Green*, that the rent-to-own transactions violated RISA and the applicable usury cap. Rent-A-Center Form 10-K at 15. *Gallagher* also granted the plaintiffs summary judgment as to liability on their claim that rent-to-own transactions were subject to the 30% usury limitation. *Id.* Rent-A-Center chose not to appeal these adverse judgments. Instead, it made a business decision to settle all of these cases at a cost of $60 million *and to continue making these high-interest sales in New Jersey despite the state laws that were consistently being held to prohibit them.*[3]

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[3] Rent-A-Center's April 1999 Form 10-K disclosed, in all capital letters, to the company's investors that pending

In sum, at the time Perez filed this action, multiple New Jersey courts had held that rent-to-own transactions (including those involving Rent-A-Center) are retail installment sales governed by RISA and its usury cap on interest charges.

3. The New Jersey Supreme Court's Decision

The New Jersey Supreme Court's decision below echoed these earlier rulings. In holding that RISA applies to rent-to-own transactions, the court focused on the Act's text, history, and underlying purposes. The court found that RISA was enacted in 1960 as "'part of a package of laws designed to protect consumers from overreaching by others, to protect consumers from overextending their own resources and also to promote the availability of financing to purchase various goods and services.'" Pet. App. 18a (quoting *Girard Acceptance Corp. v. Wallace*, 388 A.2d 582 (N.J. 1978)).

As to RISA's coverage, the court highlighted the Act's broad definition of "Retail installment contract" to "include[] a security agreement, chattel mortgage. conditional sales contract, *or other similar instrument* and any contract for the bailment or leasing of goods," where the bailee/lessee "is bound to become, *or has the option of becoming*, the owner of such goods." Pet. App. 19a-22a (emphasis added). The court found

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lawsuits in New Jersey and elsewhere, including *Robinson* and *Gallagher*, "COULD HAVE A MATERIAL ADVERSE EFFECT ON OUR FINANCIAL CONDITION AND OUR BUSINESS OPERATIONS." *Id.* at 10. Thus, Rent-A-Center must have had notice of possible liability under RISA for usury violations since it disclosed that very risk to its investors.

that the phrases "conditional sales," "similar instruments," and "has the option of becoming the owner" were fully descriptive of Rent-A-Center's transactions. *Id.* 21a-22a, 24a-26a.[4] Citing multiple prior New Jersey decisions, the court also found that Rent-A-Center's contracts were "similar in form to transactions that had been judicially recognized as conditional sales" prior to RISA's enactment, and that RISA encompassed through its statutory definition both a "conditional sale" and "any other similar instrument." *Id.* 25a, 26a.

The court further held that any uncertainty should be resolved to find coverage because of the Act's broad remedial purposes. *Id.* 22a-24a. In thus rejecting Rent-A-Center's primary argument that a customer's right to cancel brought these transactions outside the Act's coverage, the court noted that the Minnesota Supreme Court rejected this very argument with regard to that state's retail installment sales statute. *Id.* 26a-27a (quoting *Miller v. Colortyme, Inc.*, 518 N.W.2d 544, 549 (Minn. 1994) (case involving Rent-A-Center subsidiary)).

In finding the state's 30% interest ceiling in its criminal usury statute applicable under RISA, the New Jersey Supreme Court again focused on the plain language and history of these statutes. The court found that its "point of departure is the language of the Act," which uses the terms "interest" and "time price differential" interchangeably, as did the court's own precedent. Pet. App. 28a (citing N.J. STAT. ANN. § 17:16C-41; *Singer Co. v. Gardner*, 323 A.2d 457, 461 (N.J. 1974)). The

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[4] Despite the court's reliance on this exact statutory language, Rent-A-Center chose to omit much of it from its petition to this Court. *Compare* Pet. at 2, *with* Opp. at 2.

court noted that RISA was originally enacted in 1960 with a 10% limitation on the time price differential that could be charged in retail installment sales. Pet. App. 28a. The court also emphasized that when the New Jersey legislature repealed this limitation in 1981, it did not do so in a vacuum. *Id.* 29a. Rather, the legislature simultaneously (1) amended RISA to replace the 10% time-price cap with the current provision allowing interest "in an amount or amounts as agreed to by the retail seller . . . and the buyer;" and (2) amended the state's criminal usury provision to make it applicable "notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction." *Id.* 29a-30a. Noting that RISA is one of several laws amended on the same day to allow interest rates agreed to by parties, the court held it is subject to the 30% usury ceiling. *Id.* 31a-32a.[5]

Finally, the New Jersey Supreme Court rejected Rent-A-Center's argument that prior New Jersey cases compelled it to differentiate between time price differentials under RISA and interest rates under the criminal usury statute. The court found the pre-1981 cases of *Sliger v. R.H. Macy & Co., Inc.*, 283 A.2d 904 (N.J. 1971), and *Steffenauer v. Mytelka & Rose, Inc.*, 210 A.2d 88 (N.J. Super. Ct., Ch. Div. 1965), inapplicable because they addressed the state's *civil* usury statute and its application to non-RISA contracts. Pet. App. 34a; *see also Sliger*, 283

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[5] The New Jersey Supreme Court's careful analysis of RISA's and the usury statute's text and amendment history should put to rest Rent-A-Center's repeated and increasingly shrill accusations that the court "announced two new rules of law," engaged in "outlandish judicial manipulation," and "radically changed the law of New Jersey." Pet. at 3, 4, 14.

A.2d at 906 (finding civil usury statute inapplicable to revolving credit account, which then fell outside RISA); *Steffenauer*, 210 A.2d at 94 (finding civil usury statute inapplicable to non-RISA commercial sale).[6] The court thus did not overrule these cases, but found them inapposite. The court also noted that *Saul v. Midlantic Nat'l Bank*, the only case Rent-A-Center cited that post-dates the 1981 statutory amendments at issue here, "actually holds that the criminal usury statute is applicable to retail installment sales." Pet. App. 34a (citing *Saul*, 572 A.2d at 652 n.1).

Having determined, purely as a matter of state law, that the state's RISA, Consumer Fraud Act, and 30% usury ceiling apply to Rent-A-Center's rent-to-own contracts, the New Jersey Supreme Court vacated the Appellate Division's judgment for Rent-A-Center and remanded the case to the state trial court "for reinstatement of Perez's complaint and for such further proceedings as are warranted." *Id.* 38a.[7]

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[6] Moreover, contrary to Rent-A-Center's representation that these cases represented a "tide" (Pet. at 10 n.4) of case law on the application of New Jersey's time-price doctrine, *Steffenauer* itself recognized both that this doctrine could be abrogated by the legislature *and that this is precisely what the legislature did in enacting RISA*. 210 A.2d at 93-94.

[7] The court subsequently denied Rent-A-Center's motion for reconsideration. In granting the parties' motions for clarification, the court held that its judgment applied to Perez and anyone who is part of a certified plaintiff class on remand, but is otherwise prospective. Pet. App. 42a, 43a.

REASONS FOR DENYING THE PETITION

I. The Court Lacks Jurisdiction to Review this Interlocutory State-Court Decision.

A. Because Judgment is Not Final, This Court Lacks Jurisdiction Under 28 U.S.C. § 1257.

The Court lacks jurisdiction over Rent-a-Center's petition. This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." 28 U.S.C. § 1257(a). The decision below is not a final judgment or decree. The New Jersey Supreme Court *reversed* a grant of judgment for Rent-A-Center and *remanded* the case "for reinstatement of Perez's complaint and for such further proceedings as are warranted." Pet. App. 38a. Rent-A-Center now has moved the state trial court for summary judgment against Perez on state-law grounds, arguing that the New Jersey Supreme Court's decision "merely reinstated Plaintiff's complaint and left open on remand *any and all defenses to liability that RAC may have*." Rent-A-Center Memorandum to N.J. Superior Court, Camden County, dated Sept. 22, 2006, at 3. Perez has moved for certification of a plaintiff class. Both contested motions are pending in the state trial court, and would be subject to later appeal. Since the decision below reinstating Perez's claims is interlocutory, this Court does not have jurisdiction to review it.

Section 1257(a) establishes a "firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). This means that a state court's decision must be "final as an effective determination of the litigation and not merely of interlocutory

or intermediate steps therein." *Id.* Section 1257's requirement of finality "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). The New Jersey Supreme Court's decision imposed no liability on Rent-A-Center (and thus deprived it of no property interest). Indeed, Rent-A-Center is now arguing to the state trial court that it is entitled to summary judgment. The decision below is thus interlocutory and non-appealable under § 1257(a).

B. The *Cox Broadcasting* Exceptions to Section 1257's Final Judgment Requirement Do Not Apply.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974), the Court recognized four circumstances that permit review absent a final judgment. The first involves cases where "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. Second are cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Third are cases where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The final exception arises where (1) "the federal issue has been finally decided in the state courts . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action;" *and* (2) "a refusal immediately to review the state-court

decision might seriously erode federal policy." *Id.* at 482-83. None of these circumstances is present here.

The first three *Cox Broadcasting* exceptions do not apply because there are still disputed issues concerning liability and damages before the state trial court on which either party could prevail, and on which a losing party could appeal. On remand, Rent-A-Center is arguing that it is entitled to judgment on state-law grounds because Perez allegedly did not pay interest in excess of the applicable usury limit. Since the due process question raised here is not "conclusive" in these state court proceedings, and their outcome is not "preordained," *id.* at 479, the first *Cox* exception does not apply. Nor does the second exception apply since, if Rent-A-Center prevails on its pending state-law defenses, the federal-law claim would not "survive and require decision." *Id.* at 480. Likewise, the third *Cox* exception does not apply because there exists no state-law bar to a later appeal by either party, as there is in many criminal cases, *id.* at 481, in the event of an adverse judgment.

Finally, the fourth *Cox* exception is inapplicable here for two reasons. First, a reversal of the state court on Rent-A-Center's federal due process claim would *not* be preclusive of all further litigation, *id.* at 482-83, because Perez asserts claims for injunctive relief that implicate the *prospective* application of the decision below, which Rent-A-Center's due process claim does not challenge. Second, and more fundamentally, this is not a case where "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 483. *Cox* applied this exception where a pending damages judgment involving an unresolved First Amendment question could deter the present exercise of constitutionally protected

speech rights. *Id.* at 485-86. Here, requiring a final state-court judgment poses no such threat to any federal policy. Under the decision below, there is at present no injunction against any conduct by Rent-A-Center. Nor has any liability been imposed against Rent-A-Center that would deprive it of property with or without due process. Moreover, the possibility of a later damages judgment does not affect any *present* exercise of federally-protected rights because Rent-A-Center's federal-law argument does not challenge the decision's *prospective* application. Nor could it, since there is no constitutional right to charge consumers exorbitant interest rates.

In sum, there is no basis in this case to depart from Section 1257's imposition of a "firm final judgment rule." The Court thus lacks jurisdiction, and the petition should be denied.

II. Rent-A-Center Waived Its Federal-Law Argument.

A. This Court Will Not Address Federal Claims Not Properly Raised in the State Courts.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the general rule that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" under review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Where a petitioner failed to raise its federal law claim until its petition for rehearing to the state supreme court, the claim is waived. As the Court explained in *Adams*, "we have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Id.* at 89; *see also Board of Directors*

of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987) ("Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal."); *Radio Staton WOW*, 326 U.S. at 128 ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . ."). Since this is precisely what Rent-A-Center did in the state court proceedings below, its belated federal due process argument comes "too late for consideration here."

B. Rent-A-Center's Newfound Due Process Argument is Waived.

Rent-A-Center first argued that a judgment against it would violate the Fourteenth Amendment's Due Process Clause in its petition for rehearing to the New Jersey Supreme Court. Prior to that, its only reference to "due process" was a single sentence in a brief that gave no citation to federal law, and relied exclusively on state-court authority that itself identified no federal law. Because Rent-A-Center did not give the state courts below the required opportunity to consider its federal due process argument raised here, the argument is waived.

Rent-A-Center's federal due process argument was neither addressed by nor properly presented to the New Jersey courts. Nowhere in their opinions or orders did these courts address any due process argument. Where the state's highest court is silent, "the aggrieved party bears the burden of . . . demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented

here.'" *Id.* at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). Rent-A-Center cannot carry this burden.[8]

Prior to its rehearing petition, Rent-A-Center's only mention of "due process" to the New Jersey Supreme Court or Appellate Division (which address the same briefs) was the following:

> Because it is a criminal statute, any ambiguities in N.J.S.A. 2C:21-19 must be construed strictly in favor of those accused of violating the law. *State v. Livingston*, [797 A.2d 153, 158 (N.J. 2002)]. Otherwise, due process rights are violated. *State v. Churchdale Leasing, Inc.*, [557 A.2d 277, 287 (N.J. 1989)].

Pet. App. 93a-94a. Neither Rent-A-Center nor the state court cases it cited in making this argument anywhere identify the U.S. Constitution's Due Process Clause or cases applying it. *See, e.g.*, *Churchdale Leasing*, 557 A.2d at 287 ("At the heart of the rule requiring strict construction of criminal statutes is the principle of due process. *In re Suspension of DeMarco*, [414 A.2d 1339, 1345 (N.J. 1980)]" (which likewise identifies no federal law)).

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[8] Rent-A-Center suggests (Pet. at 14) that the New Jersey Supreme Court implicitly addressed its due process argument by making the ruling prospective as to other parties. Under New Jersey law, however, prospective application of a court's ruling is a matter of discretion that "is not answered by any constitutional mandate." *Fischer v. Canario*, 670 A.2d 516, 521 (N.J. 1996).

Rent-A-Center's passing invocation of "due process" without citing any federal law did not preserve the argument raised here. As the Court found in *Adams v. Robertson*:

> [T]he passing invocations of 'due process' . . . fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution, see Ala. Const., § 13 (1901), and thus they did not meet our minimal requirement that it must be clear that a *federal* claim was presented.

520 U.S. at 89 n.3 (citations omitted) (emphasis in original); *see also Rotary Int'l*, 481 U.S. at 550 n.9 ("This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction . . ."); *Webb v. Webb*, 451 U.S. 493 (1981) (lower court brief referencing "full faith and credit" in one sentence without citation "would not suffice to establish that petitioner's claim was based on the Federal Constitution.").[9]

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[9] The New Jersey courts impose the same requirement of substantive argument to preserve an issue. *South Jersey Catholic School Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary School*, 696 A.2d 709, 721 (N.J. 1997) ("Issues that are raised but are not supported with arguments are deemed waived."). Moreover, although the New Jersey Constitution does not contain an express due process clause, "the right to due process is implicit in [its] Article I, Paragraph I," recognizing "Natural and unalienable rights." *State v.*

Because Rent-A-Center did not timely present its federal due process argument for the New Jersey courts to consider, the argument is waived and the petition should be denied.

III. There is No Split of Authority on the Federal Due Process Question.

Rent-A-Center's argument (Pet. 16-28) that the decision below conflicts with decisions by this and other appellate courts applying the Fourteenth Amendment's Due Process Clause is based on the erroneous assertion that the New Jersey Supreme Court announced "new and unforeseeable rules." The state of the law in New Jersey when this case was filed in 2002 demonstrates that this assertion is baseless. As discussed above, the New Jersey Supreme Court reached its holding that RISA and the state's 30% usury ceiling apply to rent-to-own contracts by construing a 25-year old statutory scheme in light of its text, legislative history, and underlying remedial purposes. In doing so, the court overruled *no precedent*. Instead, it echoed the holdings of *every* lower state court case that previously had addressed these questions. Rent-A-Center itself was a party in interest in several of those cases and, notwithstanding those rulings, made a conscious business decision in 1999 to continue making high-interest rent-to-own sales in New Jersey, including those at issue here. This backdrop demonstrates why Rent-A-Center's claim of a lack of fair warning giving rise to a split of authority on a federal due process question utterly fails.

Feaster, 877 A.2d 229, 238 n.3 (N.J. 2005).

A. The Decision Below is Consistent With This Court's Cases.

1. This Court's Due Process Decisions Do Not Compel a Different Result.

First, the decision below does not conflict with *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *Bouie* held that a state court's construction of a criminal trespass statute in affirming a conviction violated the defendant's due process right of fair warning where this interpretation was "clearly at variance with the statutory language," and "has not the slightest support in prior South Carolina decisions." *Id.* at 356. *Bouie* first found that the state trespass statute's prohibition of "[e]ntry on lands of another after notice prohibiting same," *id.* at 349 n.1, was "admirably narrow and precise." *Id.* at 351. But *Bouie* then found that the state court's interpretation of the statute to apply to the act of *remaining* on lands after being asked to leave violated the criminal defendants' due process right to fair warning because, in the 95 years since it was enacted, "the South Carolina cases construing the statute uniformly emphasized the notice-before-entry requirement, and gave not the slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave." *Id.* at 356-57.

The state of the law in New Jersey prior to the decision below was diametrically opposite that in *Bouie*. New Jersey's civil consumer protection statute governing retail installment sales is worded broadly to apply to "a security agreement, chattel mortgage, conditional sales contract, *or any other similar instrument*," N.J. STAT. ANN. § 17:16C-1(b) (emphasis

added), Rent-A-Center's omission of this language from its petition notwithstanding. This statute's provision allowing charges in amounts agreed to by the parties was enacted in tandem with a provision making the state's criminal usury ceiling applicable "notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction." N.J. STAT. ANN. § 2C:21-19.

Moreover, unlike in *Bouie*, Rent-A-Center had ample notice that these statutes applied to its rent-to-own contracts because at least four New Jersey courts previously held that these are retail installment sales and/or that the criminal usury ceiling governs such sales. Moreover, as detailed above at 8-9, *Rent-A-Center was a party in interest in several of these cases*, each of which it chose to settle at a considerable cost rather than appeal. This case thus would only be akin to *Bouie* if Mr. Bouie had twice before been charged with trespass for identical conduct, lost and paid fines to settle both of these cases under precedent addressing identical conduct, and only then on the third time around tried to challenge these laws for failing to give him fair notice.

For the same reasons, the decision below does not conflict with *Rogers v. Tennessee*, 532 U.S. 451 (2001). *Rogers upheld* a state court's admittedly retroactive change to a state-law rule imposing criminal liability, and *rejected* a strict application of *ex post facto* rules to the due process limits on state courts as "unworkable." *Id.* at 461. Instead, *Rogers* held that *Bouie* was limited to cases involving "interpretations of criminal statutes . . . that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.* (quoting *Bouie*, 378 U.S. at 354). That is not what occurred

here. The decision below reflects the plain language of the state statutes at issue and echoes the nearly-unanimous view of lower state courts in applying these statutes. Indeed, the *only* opinions that were overturned were those of the lower courts *in this case*. Rent-A-Center's invocation of *Rogers* and *Bouie* thus misses the mark far and wide.

Similarly, *Marks v. United States*, 430 U.S. 188 (1977), addressed a change to First Amendment precedent that "undeniably relaxes" the standards limiting criminal obscenity prosecutions. *Marks* held that this expansion of criminal liability could not be applied retroactively given the "special care" for providing fair warning in the regulation of expression that implicates the First Amendment. *Id.* at 195-96. Here, there was no change in controlling precedent. The New Jersey Supreme Court distinguished all of the prior state court cases Rent-A-Center cites here, without overruling any of them. Moreover, Rent-A-Center's high-interest sales here do not implicate any of the First Amendment concerns that warranted "special care" in *Marks*. These decisions thus do not conflict.

2. The Decision Below Does Not Conflict With This Court's Dicta in *Landgraf*.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the only case Rent-A-Center cites that involves *civil* liability, the Court merely recognized a *presumption* against retroactivity in construing ambiguous statutes. *Id.* at 272. At the same time, *Landgraf* found that "the *constitutional* impediments to retroactive civil legislation are now modest." *Id.* (emphasis in original). This is even more true of state court adjudication. *See, e.g.*, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753

(1995) (a party's claim of reliance, "often present when prior law is overruled - -is the very sort that this Court [has] found insufficient to deny retroactive application of a new legal rule."); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (noting the "freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law."). In any event, *Landgraf* cannot possibly conflict with the decision below because the New Jersey Supreme Court did not announce any new or unforeseeable rule of law.

The decision below thus does not conflict with any of this Court's due process decisions.

B. The Decision Below Does Not Conflict With Any Other Courts' Decisions.

The decision below likewise does not conflict with the lower court cases Rent-A-Center cites. In *Helton v. Fauver*, 930 F.2d 1040 (3d Cir. 1991), the court on *habeas corpus* review addressed a state high court's ex post facto construction of a statute that expanded criminal liability for juveniles after all lower state court cases had rejected this expansion. *Id.* at 1048. *Helton* found this "unforeseeable departure from precedent" to violate due process. *Id.*; *see also id.* at 1047 ("In short, the language of the statute, together with the line of cases interpreting it in the New Jersey state courts, could not have put Helton on notice of, or made reasonably foreseeable, the shift in direction and the change in the law effected by the New Jersey Supreme Court."). Here, in stark contrast, the decision below is consistent with the repeated decisions of the lower New Jersey courts in the *Saul*, *Green*, *Robinson*, and *Gallagher* cases discussed herein. In light of these cases, the decision

below can hardly be called "unforeseeable," and thus does not conflict with *Helton*.

The remaining cases Rent-A-Center cites all involve explicit reversals of precedent that expand the scope of criminal liability. *See Moore v. Wyrick*, 766 F.2d 1253, 1257 (8th Cir. 1985) ("Answering this question in the affirmative, the Missouri Supreme Court explicitly overruled its prior decision in [*State v. Majors* 237 S.W. 486 (Mo. 1922)]); *United States v. Potts*, 528 F.2d 883, 886 (9th Cir. 1975) ("Our decision today, overruling [*United States v. Hoctor*, 487 F.2d 270 (9th Cir. 1973)], undoubtedly expands the scope of potential criminal liability . . ."); *People v. Martinez*, 973 P.2d 512, 521 (Cal. 1999) ("Our overruling of [*People v. Caudillo*, 580 P.2d 274 (Cal. 1978)] raises the further question whether today's holding may be applied retroactively to defendant."). Here, by contrast, the New Jersey Supreme Court imposed no criminal liability on Rent-A-Center and overturned none of its own precedent. This decision thus did not deprive Rent-A-Center of fair warning as to its potential civil liability to New Jersey consumers, and does not conflict with any of the cases cited in Rent-A-Center's petition.

That there is no conflict of authority on the due process question presented is hardly surprising. Rent-A-Center's claim of a lack of fair warning from a state supreme court decision that overturns no precedent and follows every prior lower state court case addressing the precise questions before it would create a bottomless expansion of the concept of due process. A finding that the decision below violates the Fourteenth Amendment would compel the same result in every case where a state court decides a question of first impression. This would

force every state court facing an allegedly novel question of law to issue a prospective advisory opinion, a practice the Constitution arguably *prohibits* for federal courts. *See Harper*, 509 U.S. at 107-08 (Scalia, J. concurring) (it is "'the province and duty of the judicial department to say what the law *is*,' not what the law *shall be*.") (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)). There is no split of authority because the question presented lacks any basis in fact.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 06-657

IN THE

Supreme Court of the United States

RENT-A-CENTER, INC.,

Petitioner,

v.

HILDA PEREZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

REPLY BRIEF FOR PETITIONER

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29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent opposes certiorari on three grounds, none of which is substantial. She first contends that the Supreme Court of New Jersey's reversal of a grant of summary judgment is unreviewable under 28 U.S.C. § 1257. This Court, however, has adopted a pragmatic approach to § 1257's finality requirement specifically so that it can review cases, such as this one, in which federal issues implicating important federal policies might otherwise evade review. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). She also argues that Rent-A-Center waived its federal due process claim because it did not raise the issue before the violation occurred. This Court, however, does not require parties to raise issues before they are justiciable; instead, this Court has repeatedly granted certiorari when, as here, a state supreme court renders an unexpected interpretation of state law and the petitioner raises the newly created federal issue at the first opportunity in a petition for rehearing. Finally, respondent attacks the factual predicate for Petitioner's due process claim, asserting that the New Jersey Supreme Court's decision did not announce new and unforeseeable rules. This contention is belied both by the decision below, which acknowledged that its interpretation was "not a perfect fit with the words of the statute," Pet. App. 22a, and which abrogated a common-law doctrine it had previously described as "firmly imbedded in this state," *Sliger v. R.H. Macy & Co.*, 283 A.2d 904, 906 (N.J. 1971), and by the court's eventual judgment, which made the ruling prospective as to non-parties. If, as respondent suggests, the decision below was dictated by precedent and the text of the statute, why did the state court so strangely limit its ruling's retroactive effect only to Rent-A-Center?

I. This Court Has Jurisdiction Under *Cox Broadcasting*

Respondent contends that this Court lacks jurisdiction to consider this case because the decision below is not a "[f]inal judgment" within the meaning of 28 U.S.C. § 1257(a).

Opp'n 14. To be sure, Rent-A-Center continues to contest liability in state court. But as respondent acknowledges, the Supreme Court of New Jersey has definitively rejected Rent-A-Center's federal due process claim. This Court has jurisdiction to review that federal-law ruling under *Cox Broadcasting v. Cohn*.

Respondent notes that § 1257(a) establishes "a firm final judgment rule," *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997), but this Court has not administered the finality requirement of § 1257 in the "mechanical fashion" that respondent urges. *Cox Broad.*, 420 U.S. at 477. Instead, this Court follows a "pragmatic approach" in determining finality, *id.* at 486, and has repeatedly granted review when "additional proceedings would not require the decision of other federal questions that might also require review by the Court," and when "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice'"—conditions each satisfied here.[1] *Id.* at 477–78. Indeed, this Court often enough has reviewed state supreme court decisions reversing grants of summary judgment. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), for example, this Court granted certiorari where, as here, the trial court awarded summary judgment, a state court of appeals affirmed, and then the state's supreme court reversed. *Id.* at 136–37 (considering whether the Employment Retirement Income Security Act of 1974 ("ERISA") preempted a Texas common-law claim); *see also Am. Oil Co. v. Neill*, 380 U.S. 451, 455 (1965) (addressing the constitutionality of a state taxing scheme after the Idaho Supreme Court reversed a grant of summary judgment). Indeed, in *Cox Broadcasting* itself, this Court granted certiorari where the Georgia Supreme Court reversed an award of

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[1] *Jefferson* did not require literal finality. Instead, *Jefferson* applied *Cox Broadcasting*'s pragmatic approach and found review inappropriate because, "[f]ar from terminating the litigation," the federal issue affected "only two of the four counts" in the complaint. 522 U.S. at 81.

summary judgment. 420 U.S. at 475, 485 (addressing the constitutionality of a state-law privacy claim).

This case meets all of the requirements of *Cox Broadcasting*'s fourth category, which permits review of interlocutory state-court rulings "where the federal issue has been finally decided," reversal of the ruling "would be preclusive of any further litigation on the relevant cause of action," and refusal to review the ruling "might seriously erode federal policy." 420 U.S. at 482–83.

Respondent apparently concedes that the federal issue was finally decided. Opp'n 16; *see also Chambers v. Miss.*, 410 U.S. 284, 290 n.3 (1973) (issue finally decided "despite the State Supreme Court's failure to address the constitutional issue"). She argues, though, that reversal of the state supreme court's ruling on Rent-A-Center's federal due process claim would not preclude *all* further litigation, because her claims for injunctive relief would remain live. *Id.* But that argument simply highlights the fact that the federal due process claim challenging the retroactive application of new rules is entirely separate from the validity of those new rules under state law. The federal issue is "independent of, and unaffected by," the question "'with which it happens to be entangled,'" namely, whether injunctive relief is warranted. *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 549 (1963); *see also Cox Broad.*, 420 U.S. at 483 (identifying *Curry* as a paradigmatic example of the fourth category). Moreover, a reversal would end the litigation "for all practical purposes," *see Curry*, 371 U.S. at 551; *Cox Broad.*, 420 U.S. at 483, because the new rules announced by the Supreme Court of New Jersey will govern Rent-A-Center's future conduct in New Jersey, whether or not an injunction is imposed.

This Court has recognized a wide variety of federal policies, based in statutes as well as constitutional provisions, as important enough to warrant immediate review. In *Ingersoll-Rand*, for example, this Court noted that "'[t]he very passage of ERISA demonstrates the great significance attached to in-

come security for retirement purposes'" and granted certiorari. 498 U.S. at 136 (alternation in original). Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the Court reviewed "[t]he federal question whether [an] additional workers' compensation award [was] barred by federal law" because the state court decision "might seriously erode federal policy in the area of nuclear production." *Id.* at 179. And this Court has also, in its pragmatic approach to finality, granted certiorari in cases that fall within *Cox Broadcasting*'s fourth category without expressly stating what federal policy was being preserved. *See Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964); *see also Cox Broad.*, 420 U.S. at 484 n.11 (describing *Hudson*).

Providing citizens with "an opportunity to know what the law is and to conform their conduct accordingly" is a fundamental federal policy, "'as ancient as the law itself,'" that is "deeply rooted in [this Court's] jurisprudence," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 & n.17 (1994), and is at least as important as the statutory policies vindicated in *Ingersoll-Rand* and *Goodyear Atomic*. "Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). To paraphrase *Cox Broadcasting*, "a failure to decide the question now will leave the [rent-to-own industry] in [New Jersey] operating in the shadow of the civil and criminal sanctions of a [new] rule of law and a [new interpretation of a] statute" where the constitutionality of its retroactive application "is in serious doubt." 420 U.S. at 486. The fundamental federal policy of due process, which is directly tied to the public's confidence in our system of justice, will be seriously eroded as long as the decision below, which is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'" *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), is allowed to stand.

II. Rent-A-Center Raised Its Federal Due Process Objection At The First Opportunity And Therefore Did Not Waive That Argument

Respondent also argues that Rent-A-Center waived its federal due process claim by raising it for the first time in its petition for rehearing. Opp'n 17. Rent-A-Center, however, raised this argument well before its petition for rehearing, warning both the Appellate Division and the New Jersey Supreme Court in opening briefs both that statutes must give notice in order to avoid "run[ning] afoul of procedural due process protections" and that any ambiguities in a criminal statute "must be construed strictly in favor of those accused of violating the law" in order to avoid violating due process. Pet. App. 93a–94a; *see also* Pet. 12 n.5.[2]

In any event, respondent's waiver argument fails for two reasons. First, one cannot waive a claim *before* it is ripe for adjudication. Rent-A-Center's due process rights were first violated when the New Jersey Supreme Court issued its order applying new rules retroactively to Rent-A-Center's already completed conduct. In order for a claim to be ripe for review under New Jersey law, a party seeking review must be able to show either injury or "a substantial likelihood of harm," for New Jersey courts "will not render advisory opinions or function in the abstract." *Ocean County Bd. of Realtors v. Borough of Beachwood*, 590 A.2d 736, 738 (N.J. Super. Ct. Law Div. 1991); *cf. Tex. v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon

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[2] Because these principles are identical under both state and federal law, it is inconsequential that Rent-A-Center relied on state law in its anticipatory warnings to the state courts. Where a right under state law is coextensive with the corresponding right under federal law, the identification of the state-law claim will suffice to present to the state court both the state and the federal issue. *Jackson v. Edwards*, 404 F.3d 612, 621 (2d Cir. 2005); *see also Howell v. Miss*, 543 U.S. 440, 445 (2005) (per curiam) (reserving on question whether presentation of state law claim fairly presents identical claim under federal law).

contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks omitted). Similarly, a cause of action does not accrue until an actual injury has occurred. *White v. Mattera*, 814 A.2d 627, 631–32 (N.J. 2003). As this case came to the Supreme Court of New Jersey, the possibility that the state court would reverse the decision below, abrogate the "firmly imbedded" time-price doctrine, *see Sliger*, 283 A.2d at 906, and apply its new rule retroactively to the parties was, at most, conjectural. Once this violation occurred, Rent-A-Center took the first available opportunity to contest this due process violation by filing a petition for rehearing that squarely addressed the federal issue. Pet. App. 97a–104a.

Second, "this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86 n.9 (1980). In *PruneYard*, the petitioners had relied in lower state courts on a California Supreme Court decision that permitted privately owned shopping centers to ban publicly expressive activity on their property. *Id.* at 77–79. The petitioners raised federal constitutional arguments, however, before the state supreme court, which unexpectedly reversed its prior rule. This Court considered the federal issues preserved, for "[i]t was not until that time that [the petitioners] could have reasonably expected that the validity of the earlier [rule] would be questioned." *Id.* at 87 n.9. *See also Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review."); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930) (concluding that "[t]he additional federal claim thus made was timely, since it was raised at the first opportunity" by the filing of a petition for rehearing with the state supreme court). In short, "[t]here is no doubt that the federal claim was timely if the ruling of the

state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. State of Ga.*, 295 U.S. 441, 444 (1935); *see also Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366–67 (1932); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) ("[W]hen the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.").

By raising the due process retroactivity issue at its first opportunity by filing a motion for rehearing, Rent-A-Center provided the state court "'a fair opportunity to address the federal question that is sought to be presented here,'" *Adams v. Robertson*, 520 U.S. 83, 87 (1997) (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)), and it did so "with 'fair precision and in due time,'" *id.* (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). Rent-A-Center's motion for rehearing set out the principles governing retroactive application of new rules and explained how the decision below directly conflicted with this Court's decision in *Bouie*. Pet. App. 97a–104a. The fact that the New Jersey Supreme Court chose not to attempt to provide a reasoned explanation for its failure to follow *Bouie* does not deprive this Court of jurisdiction to correct that error. *See Chambers*, 410 U.S. at 290 n.3 (explaining that a state court's refusal to address a properly presented federal claim does not render its decision unreviewable).

III. The Decision Below Violated Rent-A-Center's Due Process Rights And Warrants Review

Respondent nowhere disputes the exceptional importance of the question presented. Nor does she anywhere contest that this Court's decisions—and those of several courts of appeals—establish that the Due Process Clause limits the authority of state courts to apply new state-law rules retroactively. Instead, respondent primarily attacks the state-law

predicate for Rent-A-Center's due process claim, drawing upon unpublished interlocutory trial court rulings and dicta buried in a footnote to bolster her assertion that the decision below was compelled by "the plain language of the state statutes at issue" and "did not announce any new or unforeseeable rule of law." Opp'n 24, 25. Respondent's vision of the decision below, however, is refuted by the decision itself.

The state supreme court here candidly admitted that the statutory text was not its principal interpretive guide; its desired interpretation was "not a perfect fit with the words of the statute." Pet. App. 22a. The state court, therefore looked to "'[t]he spirit of the legislative direction'" and "'evident legislative design'" rather than the "'literal sense of the [statute's] terms.'" Pet. App. 23a, 24a. This results-oriented interpretive methodology cannot be reconciled with respondent's view that the "plain language of the statute" admitted only of her interpretation.

Moreover, the state supreme court's actions on rehearing—first making its ruling prospective, and later amending the order to be retroactive only as to the parties—make it absolutely clear that the state court recognized that its ruling fundamentally changed the law. While respondent is correct that under New Jersey law, "prospective application of a court's ruling is a matter of discretion," Opp'n 19 n.8, that discretion is appropriately exercised only when the holding in question represents a "significant change in the law." *Scafidi v. Seiler*, 574 A.2d 398, 408 (N.J. 1990). *See also Montells v. Haynes*, 627 A.2d 654, 660 (N.J. 1993) ("[p]rospective application is appropriate when a decision establishes a new principle of law" (citing *Chevron Oil v. Huson*, 404 U.S. 92 (1971)). Prospective application is "particularly appropriate when . . . a member of the public could reasonably have 'relied on a different conception of the state of the law.'" *Montells*, 627 A.2d at 662.

By making its judgment "prospective" as to non-parties, Pet. App. 43a, the Supreme Court of New Jersey necessarily acknowledged that it had effected a "significant change in the

law," *Scafidi*, 574 A.2d at 408, and that "a member of the public could reasonably have 'relied on a different conception of the state of the law,'" *Montells*, 627 A.2d at 662. It could not otherwise have made its ruling partially prospective. *See State v. Knight*, 678 A.2d 642, 651 (N.J. 1996) ("Our cases have recognized that if a ruling does not involve a 'departure from existing law,' the retroactivity question never arises and our power to limit the retroactive effect of a decision is not implicated.") (quoting *State v. Burstein*, 427 A.2d 525, 529 (N.J. 1981)). Respondent thus could be correct in her assertion that the state court "did not announce any new or unforeseeable rule of law," Opp'n 25, only if the Supreme Court of New Jersey had erred in applying its retroactivity jurisprudence. But this Court "presum[es] that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). That presumption of regularity compels this Court to reach exactly the conclusion that respondent rejects: that, on rehearing, the state supreme court concluded that its decision had worked a "significant change in the law," *Scafidi*, 574 A.2d at 408. And having discerned the state supreme court's view of the state-law implications of its holding, this Court is not at liberty to disregard it. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State."); *see also Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111–12 (1980) ("this Court accords 'respectful consideration and great weight to the views of the state's highest court' on matters of state law").

To the extent that respondent argues that the due process right of fair warning has application only in criminal adjudications (*see* Opp'n 23–24), she is certainly incorrect. Four terms ago, this Court confirmed that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416. And in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), this Court

held that "'basic norms of constitutional adjudication'" required that whatever retroactivity rules apply in the criminal context perforce applied in the civil context as well. *Id.* at 97 (quoting *Griffith v. Ky.*, 479 U.S. 314, 322 (1987)). To be sure, *Bouie* arose in the context of a criminal case, but *State Farm* and *Harper* demonstrate that the due process right to fair warning on which *Bouie* turned has equal application in civil cases.[3]

Finally, respondent lampoons Rent-A-Center's argument as advocating a "bottomless expansion of the concept of due process." Opp'n 26. This is a merits contention, and it is wrong is any event. Rent-A-Center seeks only to apply in a civil case the due process principle announced in *Bouie*—that new rules "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'" cannot be applied retroactively. *Bouie*, 378 U.S. at 354. If the decision below is left undisturbed, it is the ability of state courts to revise rights and settled expectations through outlandish, results-oriented judicial manipulation that will be "bottomless."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[3] Contrary to respondent's suggestion (at 24–25), neither *Harper* nor *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), requires state courts to apply new and unforeseeable rules of state law retroactively in civil cases. Those cases turned on the Supremacy Clause, rejecting the proposition that a *state* court could give a new rule of *federal* law announced by the Supreme Court only prospective application. *See Harper*, 509 U.S. at 94–100; *Reynoldsville Casket Co.*, 514 U.S. at 752–53.

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